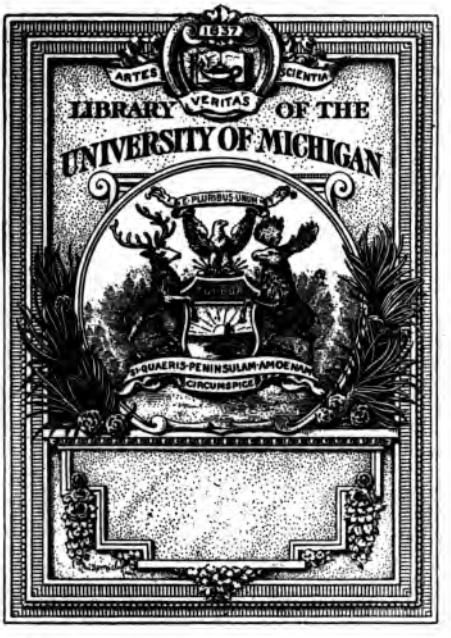
Armed Merchantmen.

International Relations of U.S.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64TH CONGRESS, 1st Session } SENATE 1916 { DOCUMENT No. 332

ARMED MERCHANTMEN

INTERNATIONAL RELATIONS OF THE UNITED STATES

"DECLARATION OF PARIS, 1856"
"ARMED MERCHANTMEN" } *Moore's Digest of International Law*

"ARMED MERCHANTMEN," *by A. Pearce Higgins, American Journal of International Law, October, 1914*

"RESISTANCE AGAINST LAWFUL EXERCISE OF THE RIGHT OF STOPPAGE, VISIT, AND SEARCH, ETC.," *by Dr. George Schramm*

"ARMED MERCHANTMEN," *by Jonkheer W. J. M. von Eysinga*

"THE GOVERNMENT AND THE WAR," *by Col. George Harvey North American Review, May, 1915*

WASHINGTON
GOVERNMENT PRINTING OFFICE
1916

SUBMITTED BY MR. STONE.

IN THE SENATE OF THE UNITED STATES,
February 18, 1916.

Ordered, That an extract appearing on pages 561 to 583, inclusive, in volume 7 of Moore's International Law Digest, entitled "Declaration of Paris," and an article printed on pages 705 to 722, inclusive, in volume 8 of the American Journal of International Law, entitled "Armed merchant ships," by A. Pearce Higgins, be printed as a Senate document.

Attest:

JAMES M. BAKER,
Secretary.

SUBMITTED BY MR. STONE.

IN THE SENATE OF THE UNITED STATES,
February 21 (calendar day February 23), 1916.

Ordered, That an extract from Moore's Digest of International Law entitled "Arming of merchant vessels"; also an article by Dr. George Schramm, counselor of the German Imperial Navy Department, on the same subject; also an article written by W. J. M. von Eysinga, professor in Leiden University, on the same subject; also certain matter which was printed as an appendix to a speech delivered by Senator Lodge on the 18th instant, together with an article written by Col. George Harvey in the North American Review of May, 1915, entitled "The Government and the war," be printed as a part of Senate Document No. 332, Sixty-fourth Congress, first session.

Attest:

JAMES M. BAKER,
Secretary.

ARMED MERCHANTMEN AND PRIVATEERS.

DECLARATION OF PARIS.

[Reprinted from vol. 7, Moore's International Law Digest.]

SECTION 1221.

"Considering that maritime law, in time of war, has long been the subject of deplorable disputes;

"That the uncertainty of the law and of the duties in such a matter, gives rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties, and even conflicts;

"That it is consequently advantageous to establish a uniform doctrine on so important a point;

"That the plenipotentiaries assembled in congress at Paris cannot better respond to the intentions by which their Governments are animated, than by seeking to introduce into international relations fixed principles in this respect;

"The above-mentioned plenipotentiaries, being duly authorised, resolved to concert among themselves as to the means of attaining this object; and, having come to an agreement, have adopted the following solemn declaration:

"1. Privateering is, and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag;

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"The Governments of the undersigned plenipotentiaries engage to bring the present declaration to the knowledge of the states which have not taken part in the congress of Paris, and to invite them to accede to it.

"Convinced that the maxims which they now proclaim cannot but be received with gratitude by the whole world, the undersigned plenipotentiaries doubt not that the efforts of their Governments to obtain the general adoption thereof, will be crowned with full success.

"The present declaration is not and shall not be binding, except between those powers who have acceded, or shall accede, to it.

"Done at Paris, the 16th of April, 1856."

Herlstet's Map of Europe by Treaty, II, 1282.

The foregoing declaration respecting maritime law was signed by the representatives of all the seven powers in the Congress of Paris, namely, Austria, France, Great Britain, Prussia, Russia, Sardinia, and Turkey.

It was afterwards acceded to as follows: Anhalt-Dessau-Coethen (June 17, 1856); Argentine Confederation (Oct. 1, 1856); Baden (July 30, 1856); Bavaria (July 4, 1856); Belgium (June 6, 1856); Brazil (March 18, 1858);

Bremen (June 11, 1856); Brunswick (Dec. 7, 1857); Chile (Aug. 13, 1856); Denmark (June 25, 1856); Ecuador (Dec. 6, 1856); Frankfort (June 17, 1856); Germanic Confederation (July 10, 1856); Greece (June 20, 1856); Guatemala (Aug. 30, 1856); Hamburg (July 27, 1856); Hanover (May 31, 1856); Hayti (Sept. 17, 1856); Hesse-Cassel (June 4, 1856); Hesse-Darmstadt (June 15, 1856); Lübeck (June 20, 1856); Mecklenburg-Schwerin (July 22, 1856); Mecklenburg-Strelitz (Aug. 25, 1856); Modena (July 29, 1856); Nassau (June 18, 1856); Netherlands (June 7, 1856); New Granada (July 31, 1856), subject to the ratification of the legislature); Oldenburg (June 9, 1856); Parma (Aug. 20, 1856); Peru (Oct. 5, 1857); Portugal (July 28, 1856); Roman States (June 3, 1856); Saxe-Altenburg (June 9, 1856); Saxe-Coburg-Gotha (June 22, 1856); Saxe-Meiningen (June 30, 1856); Saxe-Weimar June 22, 1856); Saxony (June 16, 1856); Two Sicilies (May 31, 1856); Sweden and Norway (June 13, 1856); Switzerland (July 28, 1856); Tuscany (June 5, 1856); Würtemberg (June 24, 1856). (Herlstet's Map of Europe by Treaty, II. 1284.)

"The Government of Uruguay has likewise given its entire consent to the four principles, subject to the ratification of the legislative power. Spain, without acceding to the declaration of April 16, on account of the first point, which relates to the abolition of privateering, has replied that she approves the other three. Mexico has made the same response." (Report of M. Walewski, min. of for. aff., to the Emperor of the French, June 12, 1858, 48 Br. and For. State Papers. 132, 133.)

The reply of the United States is given below.

"On the proposition of Count Walewski, and recognizing that it is to the common interest to maintain the indivisibility of the four principles mentioned in the declaration signed this day, the plenipotentiaries agree that the powers which have signed it, or which shall accede thereto, shall not in future enter into any arrangement, concerning the application of the law of neutrals in time of war, which does not rest altogether upon the four principles embodied in the said declaration.

"Upon an observation made by the plenipotentiaries of Russia, the congress concurred in the view that the present resolution could not have a retroactive effect nor invalidate previous conventions."

Protocol No. 24, Congress of Paris, session of April 16, 1856, 46 Br. and For. State Papers, 137.

See, generally, Stark's Abolition of Privateering and the Declaration of Paris; New York, 1897. This monograph presents, in an attractive style, an excellent exposition of the subject to which it relates.

See, also, as to the declaration of Paris, 144 Edinburgh Review, 353.

"Soon after the commencement of the late war in Europe this Government submitted to the consideration of all maritime nations two principles for the security of neutral commerce—one that the neutral flag should cover enemies' goods, except articles contraband of war, and the other that neutral property on board merchant vessels of belligerents should be exempt from condemnation, with the exception of contraband articles. These were not presented as new rules of international law, having been generally claimed by neutrals, though not always admitted by belligerents. One of the parties to the war (Russia) as well as several neutral powers, promptly acceded to these propositions, and the two other principal belligerents (Great Britain and France) having consented to observe them for the present occasion, a favorable opportunity seemed to be presented for obtaining a general recognition of them, both in Europe and America.

"But Great Britain and France, in common with most of the states of Europe, while forbearing to reject, did not affirmatively act upon the overtures of the United States.

"While the question was in this position, the representatives of Russia, France, Great Britain, Austria, Prussia, Sardinia, and Turkey, assembled at Paris, took into consideration the subject of maritime rights, and put forth a declaration containing the two principles which this Government had submitted nearly two years before to the consideration of maritime powers, and adding thereto the following propositions: 'Privateering is and remains abolished,' and 'blockades in order to be binding must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy;' and to the declaration thus composed of four points, two of which had already been proposed by the United States, this Government has been invited to accede by all the powers represented at Paris except Great Britain and Turkey. To the last of the two additional propositions—that in relation to blockades—there can certainly be no objection. It is merely the definition of what shall constitute the effectual investment of a blockaded place, a definition for which this Government has always contended, claiming indemnity for losses where a practical violation of the rule thus defined has been injurious to our commerce. As to the remaining article of the declaration of the conference at Paris, that 'privateering is and remains abolished,' I certainly can not ascribe to the powers represented in the conference of Paris any but liberal and philanthropic views in the attempt to change the unquestionable rule of maritime law in regard to privateering. Their proposition was doubtless intended to imply approval of the principle that private property upon the ocean, although it might belong to the citizens of a belligerent state, should be exempted from capture; and had that proposition been so framed as to give full effect to the principle, it would have received my ready assent on behalf of the United States. But the measure proposed is inadequate to that purpose. It is true that if adopted private property upon the ocean would be withdrawn from one method of plunder, but left exposed meanwhile to another mode, which could be used with increased effectiveness. The aggressive capacity of great naval powers would be thereby augmented, while the defensive ability of others would be reduced. Though the surrender of the means of prosecuting hostilities by employing privateers, as proposed by the conference of Paris, is mutual in terms, yet in practical effect it would be the relinquishment of a right of little value to one class of states, but of essential importance to another and a far larger class. It ought not to have been anticipated that a measure so inadequate to the accomplishment of the proposed object and so unequal in its operation would receive the assent of all maritime powers. Private property would be still left to the depredations of the public armed cruisers.

"I have expressed a readiness on the part of this Government to accede to all the principles contained in the declaration of the conference of Paris provided that the one relating to the abandonment of privateering can be so amended as to effect the object for which, as is presumed, it was intended—the immunity of private property on the ocean from hostile capture. To effect this object, it is proposed to add to the declaration that 'privateering is and remains abolished' the following amendment:

"'And that the private property of subjects and citizens of a belligerent on the high seas shall be exempt from seizure by the public

armed vessels of the other belligerent, except it be contraband.' This amendment has been presented not only to the powers which have asked our assent to the declaration to abolish privateering, but to all other maritime states. Thus far it has not been rejected by any, and is favorably entertained by all which have made any communication in reply.

"Several of the governments regarding with favor the proposition of the United States have delayed definitive action upon it only for the purpose of consulting with others, parties to the conference of Paris. I have the satisfaction of stating, however, that the Emperor of Russia has entirely and explicitly approved of that modification and will cooperate in endeavoring to obtain the assent of other powers, and that assurances of a similar purport have been received in relation to the disposition of the Emperor of the French."

President Pierce, annual message, Dec. 2, 1856, Richardson's Messages, V. 412.

See Lawrence's Wheaton (1863), 640, 641, 778; Dana's Wheaton, sec. 475, note 223; Twiss, Belligerent Right on the High Seas since the Declaration of Paris (London, 1884); Woolsey, Int. Law (6th ed.), 205, 313, 344.

The representatives of the European powers represented in the congress of Paris having solicited the adhesion of the United States to the declaration concerning maritime rights, Mr. Marcy, who was then Secretary of State, entered into correspondence with various Governments not represented in that congress with the object of acquainting them with the views of the United States and of securing, if possible, concurrence of action. On July 14, 1856, he instructed Mr. Gadsden to approach the Mexican Government, in the hope that it might be induced to take the same course as the United States. Mr. Gadsden was informed that the United States would readily adhere to all the rules of the declaration, except the first. It had, in fact, on the outbreak of the Crimean war opened negotiations with maritime nations for the general adoption of the propositions embraced in the second and third rules; and the fourth rule, requiring blockades to be effectively maintained, had always been observed and supported by the United States as a principle of international law. The United States, however, was unwilling to accept the first rule, forbidding privateering, unless it should be so amended as to exempt private property at sea from capture. An apprehension was felt by the United States that, unless private property on the ocean was protected from seizure by public armed vessels as well as by privateers, the rule would be exceedingly injurious to the commerce of all nations not occupying the first rank among naval powers. A similar instruction was sent to the American minister at Brussels.

The argument made in these instructions was powerfully elaborated in the note addressed by Mr. Marcy to the Count de Sartiges on July 28, 1856, in formal reply to the invitation to adhere to the declaration. The reasons against the unconditional abolition of privateering, as they were outlined in President Pierce's annual message of 1854, were repeated and amplified; and an offer was made on the part of the United States to adhere to the declaration as a whole if it should be so amended as to exempt private property at sea from belligerent capture, except in the cases of contraband and blockade.

On the next day Mr. Marcy addressed an instruction to Mr. Daniel, American minister at Turin, in which he expressed a wish

to learn what would be the treatment of American privateers on the high seas and in Sardinian ports in case the United States should be at war with a power which had acceded to the declaration. The United States, he said, did not seriously apprehend that its rights in regard to the employment of privateers would be affected, directly or indirectly, by the state of things which had arisen out of the congress of Paris; but it would be gratified to be assured that no complications were likely to arise.

October 3, 1856, Mr. Marcy informed Mr. Vroom, at Berlin, that Russia had informed the United States that if the proposed amendment should become "the object of a collective deliberation," the Imperial Government would favor its adoption.

Mr. Marcy, Sec. of State, to Mr. Gadsden, min. to Mexico, No. 66, July 14, 1856, MS. Inst. Mexico, XVII. 73; Mr. Marcy, Sec. of State, to Mr. Siebels, min. to Belgium, No. 19, July 14, 1856, MS. Inst. Belgium, I. 94; Mr. Marcy, Sec. of State, to Count Sartiges, July 28, 1856, 55 Br. and For. State Papers, 589; Mr. Marcy, Sec. of State, to Mr. Daniel, min. to Sardinia, No. 18, July 29, 1856, MS. Inst. Italy, I. 93; Mr. Marcy, Sec. of State, to Mr. Vroom, min. to Prussia, No. 33, Oct. 3, 1856, MS. Inst. Prussia, XIV. 239.

The President "finds himself unable to agree to the first principle in the 'declaration' contained in Protocol No. 23, which proposes to abolish privateering, or to the proposition in the Protocol No. 24, which declares the indivisibility of the four principles of the declaration, and surrenders the liberty to negotiate in regard to neutral rights except on inadmissible conditions. It can not have been the object of the governments represented in the congress at Paris to obstruct the adoption of principles which all approve and are willing to observe, unless they are encumbered by an unrelated principle to which some governments can not accede without a more extended application of it than that which is proposed by the Paris Congress." (Mr. Marcy, Sec. of State, to Mr. Mason, min. to France, No. 87, July 29, 1856, MS. Inst. France, XVI. 336.)

"You are instructed by the President to propose to the Government of Mexico to enter into an arrangement for its adherence with the United States to the four principles of the declaration of the congress, provided the first of them is amended, as specified in my note to the Count de Sartiges. Without such amendment, the President is constrained for many weighty reasons, some of which are stated in that note, to decline acceding to the first principle of the 'declaration.' The President, however, will readily give his consent to the remaining three principles." (Mr. Marcy, Sec. of State, to Mr. Forsyth, Aug. 29, 1856, MS. Inst. Mexico, XVII. 89.)

See, on the subject of maritime law, Mr. Marcy, Sec. of State, to Mr. Dallas, No. 48, Jan. 31, 1857, MS. Inst. Great Britain, XVII. 58.

"Count Walewski has communicated to Mr. Mason confidentially, in very decisive terms, the determination of France to concur in our amendment and given assurances that he would soon agree to formalize a proper instrument for that purpose. Russia has informed this Government of her willingness to do the same thing. In a less direct manner we are informed that Holland is prepared to act favorably on our proposition. Prussia has, I believe, always been favorable to it; but her situation with regard to other powers, particularly Great Britain, has disinclined her to take the lead in the case. Public opinion in Great Britain, I believe, is with us, but the Government will resist it as long as it will be safe to do so. She will probably delay the immediate consummation of the measure, but it will ultimately be adopted. Portugal will lose the credit which she would have gained by acting promptly on your earliest suggestion."

Mr. Marcy, Sec. of State, to Mr. O'Sullivan, min. to Portugal, No. 21, Nov. 24, 1856, MS. Int. Portugal, XIV. 185.

See, also, same to same, No. 20, Oct. 25, 1856, id. 183.

"With reference to the instructions which have heretofore been given to you with a view to a modification of the rules of maritime law which were proposed by the conference at Paris, I am directed by the President to instruct you to suspend negotiations upon the subject until you shall have received further instructions. He has not yet had time to examine the questions involved, and he deems it necessary to do so before any further steps in the matter are taken."

Mr. Cass, Sec. of State, to Mr. Dallas, min. to England, No. 60, April 3, 1857, 17 MS. Inst. Great Britain, 71.

A similar passage may be found in Mr. Cass, Sec. of State, to Mr. Vroom, min. to Prussia, No. 41, April 7, 1857, MS. Inst. Prussia, XIV. 245.

"Circumstances have delayed an answer to your letter, enquiring the views of the United States respecting the changes in the maritime law proposed by the conference at Paris. But I have now the honor to inform your lordship, that, since the issuing of the instructions to which you refer, and which were given to the ministers of the United States at London and Paris, to suspend all negotiations upon that subject till the farther views of the Government were communicated to them, the President has not thought it expedient to authorize them to renew the discussion. I do not understand from your lordship that any variation has been made in the propositions of the Paris conference which this Government found itself unable to accept, and the President does not feel at liberty to determine in advance what might be the views of the United States upon this subject, if it should be presented in a new form. He can only promise to give it that respectful consideration which its importance deserves."

Mr. Cass, Sec. of State, to Lord Napier, British min., Dec. 11, 1858, MS. Notes to Great Britain, VIII. 190.

Mr. Marcy having proposed, in his note of July 28, 1856, to amend article 1 of the declaration, and having also stated that the President approved articles 2, 3, and 4, independently of the first, Mr. Dallas, American minister in London, on February 24, 1857, "renewed the proposal in regard to the first article, and submitted a draft of convention, in which the article so amended would be embodied with the other three articles. But, before any decision was taken on this proposal, a change took place in the American Government by the election of a new President of the United States, and Mr. Dallas announced, on the 25th of April, 1857, that he was directed to suspend negotiations on the subject; up to the present time those negotiations have not been renewed.

"The consequence is, that the United States remaining outside the provisions of the Declaration of Paris, the uncertainty of the law and of international duties with regard to such matters may give rise to differences of opinion between neutrals and belligerents which may occasion serious difficulties and even conflicts.

"It is with a view to remove beforehand such 'difficulties,' and to prevent such 'conflicts,' that I now address you.

"For this purpose I proceed to remark on the four articles, beginning, not with the first, but with the last.

"In a letter to the Earl of Clarendon of the 24th of February, 1857, Mr. Dallas, the minister of the United States, while submitting the draft of a new convention, explains the views of the Government of the United States on the four articles.

"In reference to the last article, he says: 'The fourth of those principles, respecting blockades, had, it is believed, long since become a fixed rule of the law of war.'

"There can be no difference of opinion, therefore, with regard to the fourth article.

"With respect to the third article, the principle laid down in it has long been recognized as law, both in Great Britain and in the United States. Indeed this part of the law is stated by Chancellor Kent to be uniform in the two countries.

"With respect to the second article, Mr. Dallas says, in the letter before quoted: 'About two years prior to the meeting of [the] congress at Paris, negotiations had been originated and were in train with the maritime nations for the adoption of the second and third propositions substantially as enumerated in the declaration.'

"The United States have therefore no objection in principle to the second proposition.

"Indeed Her Majesty's Government have to remark that this principle is adopted in the treaties between the United States and Russia of the 22d of July, 1854, and was sanctioned by the United States in the earliest period of the history of their independence by their accession to the armed neutrality.

"With Great Britain the case has been different. She formerly contended for the opposite principle as the established rule of the law of nations.

"But having, in 1856, upon full consideration, determined to depart from that rule, she means to adhere to the principle she then adopted. The United States, who have always desired this change, can, it may be presumed, have no difficulty in assenting to the principle set forth in the second article of the Declaration of Paris.

"There remains only to be considered the first article, namely, that relating to privateering, from which the Government of the United States withhold their assent. Under these circumstances it is expedient to consider what is required on this subject by the general law of nations. Now, it must be borne in mind that privateers bearing the flag of one or other of the belligerents may be manned by lawless and abandoned men, who may commit, for the sake of plunder, the most destructive and sanguinary outrages.

"There can be no question but that the commander and crew of the ship bearing a letter of marque must, by law of nations, carry on their hostilties according to the established laws of war. Her Majesty's Government must, therefore, hold any government issuing such letters of marque responsible for, and liable to make good, any losses sustained by Her Majesty's subjects in consequence of wrongful proceeding of vessels sailing under such letters of marque.

"In this way the object of the Declaration of Paris may, to a certain extent, be attained without the adoption of any new principle.

"You will urge these views upon Mr. Seward.

"The proposals of Her Majesty's Government are made with a view to limit and restrain that destruction of property and that interruption of trade which must, in a greater or less degree, be the inevitable consequence of the present hostilities. Her Majesty's Government expect that these proposals will be received by the United States Government in a friendly spirit. If such shall be the case,

you will endeavor (in concert with M. Mercier) to come to an agreement on the subject binding France, Great Britain, and the United States.

"If these proposals should, however, be rejected, Her Majesty's Government will consider what other steps should be taken with a view to protect from wrong and injury the trade and the property and persons of British subjects."

Earl Russell, British foreign secretary, to Lord Lyons, British min. at Washington, May 18, 1861, Dip. Cor. 1861, 131, 132–133.

See Mr. Marcy, Sec. of State, to Mr. Dallas, No. 48, Jan. 31, 1857, MS. Inst. Great Britain XVII. 58.

"The advocates of benevolence and the believers in human progress, encouraged by the slow though marked meliorations of the barbarities of war which have obtained in modern times, have been, as you are well aware, recently engaged with much assiduity in endeavoring to effect some modifications of the law of nations in regard to the rights of neutrals in maritime war. In the spirit of these movements the President of the United States, in the year 1854, submitted to the several maritime nations two propositions, to which he solicited their assent as permanent principles of international law, which were as follows:

"1. Free ships make free goods; that is to say, that the effects or goods belonging to subjects or citizens of a power or state at war are free from capture or confiscation when found on board of neutral vessels, with the exception of articles contraband of war.

"2. That the property of neutrals on board an enemy's vessel is not subject to confiscation unless the same be contraband of war.

"Several of the governments to which these propositions were submitted expressed their willingness to accept them, while some others, which were in a state of war, intimated a desire to defer acting thereon until the return of peace should present what they thought would be a more auspicious season for such interesting negotiations.

"On the 16th of April, 1856, a congress was in session at Paris. It consisted of several maritime powers, represented by their plenipotentiaries, namely, Great Britain, Austria, France, Russia, Prussia, Sardinia, and Turkey. That congress having taken up the general subject to which allusion has already been made in this letter, on the day before mentioned, came to an agreement, which they adopted in the form of a declaration, to the effect following, namely:

"1. Privateering is and remains abolished.

"2. The neutral flag covers enemy's goods, with the exception of contraband of war.

"3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag.

"4. Blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the enemy.

"The agreement pledged the parties constituting the congress to bring the declaration thus made to the knowledge of the states which had not been represented in that body, and to invite them to accede to it. The congress, however, at the same time insisted, in the first place, that the declaration should be binding only on the powers who were

or should become parties to it as one whole and indivisible compact; and, secondly, that the parties who had agreed, and those who should afterwards accede to it, should, after the adoption of the same, enter into no arrangement on the application of maritime law in time of war without stipulating for a strict observance of the four points resolved by the declaration.

"The declaration, which I have thus substantially recited of course prevented all the powers which became parties to it from accepting the two propositions which had been before submitted to the maritime nations by the President of the United States.

"The declaration was, in due time, submitted by the Governments represented in the congress at Paris to the Government of the United States.

"The President, about the 14th of July, 1856, made known to the states concerned his unwillingness to accede to the declaration. In making that announcement on behalf of this Government, my predecessor, Mr. Marcy, called the attention of those states to the following points, namely:

"1st. That the second and third propositions contained in the Paris declaration are substantially the same with the two propositions which had before been submitted to the maritime states by the President.

"2d. That the Paris declaration, with the conditions annexed, was inadmissible by the United States in three respects, namely: 1st. That the Government of the United States could not give its assent to the first proposition contained in the declaration, namely, that 'Privateering is and remains abolished,' although it was willing to accept it with an amendment which should exempt the private property of individuals, though belonging to belligerent states, from seizure or confiscation by national vessels in maritime war. 2d. That for this reason the stipulation annexed to the declaration, viz: that the propositions must be taken altogether or rejected altogether, without modification, could not be allowed. 3d. That the fourth condition annexed to the declaration, which provided that the parties acceding to it should enter into no negotiation for any modifications of the law of maritime war with nations which should not contain the four points contained in the Paris declaration, seemed inconsistent with a proper regard to the national sovereignty of the United States.

"On the 29th of July, 1856, Mr. Mason, then minister of the United States at Paris, was instructed by the President to propose to the Government of France to enter into an arrangement for its adherence, with the United States, to the four principles of the Declaration of the Congress of Paris, provided the first of them should be amended as specified in Mr. Marcy's note to the Count de Sartiges on the 28th of July, 1856. Mr. Mason accordingly brought the subject to the notice of the Imperial Government of France, which was disposed to entertain the matter favorably, but which failed to communicate its decision on the subject to him. Similar instructions regarding the matter were addressed by this Department to Mr. Dallas, our minister at London, on the 31st day of January, 1857; but the proposition above referred to had not been directly presented to the British Government by him when the administra-

tion of this Government by Franklin Pierce, during whose term these proceedings occurred, came to an end, on the 3d of March, 1857, and was succeeded by that of James Buchanan, who directed the negotiations to be arrested for the purpose of enabling him to examine the questions involved, and they have ever since remained in that state of suspension.

"The President of the United States has now taken the subject into consideration, and he is prepared to communicate his views upon it, with a disposition to bring the negotiation to a speedy and satisfactory conclusion.

"For that purpose you are hereby instructed to seek an early opportunity to call the attention of Her Majesty's Government to the subject, and to ascertain whether it is disposed to enter into negotiations for the accession of the Government of the United States to the Declaration of the Paris Congress, with the conditions annexed by that body to the same; and if you shall find that Government so disposed, you will then enter into a convention to that effect, substantially in the form of a project for that purpose herewith transmitted to you; the convention to take effect from the time when the due ratifications of the same shall have been exchanged. It is presumed that you will need no special explanation of the sentiments of the President on this subject for the purpose of conducting the necessary conferences with the Government to which you are accredited. Its assent is expected on the ground that the proposition is accepted at its suggestion, and in the form it has preferred. For your own information it will be sufficient to say that the President adheres to the opinion expressed by my predecessor, Mr. Marcy, that it would be eminently desirable for the good of all nations that the property and effects of private individuals, not contraband, should be exempt from seizure and confiscation by national vessels in maritime war. If the time and circumstances were propitious to a prosecution of the negotiation with that object in view, he would direct that it should be assiduously pursued. But the right season seems to have passed, at least for the present. Europe seems once more on the verge of quite general wars. On the other hand, a portion of the American people have raised the standard of insurrection, and proclaimed a provisional government, and, through their organs, have taken the bad resolution to invite privateers to prey upon the peaceful commerce of the United States.

"Prudence and humanity combine in persuading the President, under the circumstances, that it is wise to secure the lesser good offered by the Paris Congress, without waiting indefinitely in hope to obtain the greater one offered to the maritime nations by the President of the United States."

Mr. Seward, Sec. of State, to Mr. Adams, min. to England, Circular, April 24, 1861, Dip. Cor. 1861, 18.

The same circular, mutatis mutandis, was sent to the American ministers in France, Russia, Prussia, Austria, Belgium, Italy, and Denmark. Also to the Netherlands. (Mr. Seward, Sec. of State, to Mr. Pike, No. 2, May 10, 1861, MS. Inst. Netherlands, XIV. 194.)

The draft of a convention, sent to Mr. Adams, was as follows:

"The United States of America and Her Majesty the Queen of Great Britain and Ireland, being equally animated by a desire to define with more precision the rights of belligerents and neutrals in time of war, have, for that

purpose, conferred full powers, the President of the United States upon Charles F. Adams, accredited as their envoy extraordinary and minister plenipotentiary to her said Majesty, and Her Majesty the Queen of Great Britain and Ireland, upon ———.

"And the said plenipotentiaries, after having exchanged their full powers, have concluded the following articles:

"ARTICLE I.

"1. Privateering is and remains abolished. 2. The neutral flag covers enemy's goods, with the exception of contraband of war. 3. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag. 4. Blockades in order to be binding, must be effective; that is to say, maintained by a force sufficient really to prevent access to the coast of the enemy.

"ARTICLE II.

"The present convention shall be ratified by the President of the United States of America, by and with the advice and consent of the Senate, and by Her Majesty the Queen of Great Britain and Ireland, and the ratifications shall be exchanged at Washington, within the space of six months from the signature, or sooner if possible. In faith whereof, the respective plenipotentiaries have signed the present convention in duplicate, and have thereto affixed their seals.

"Done at London, the —— day of ———, in the year of our Lord, one thousand eight hundred and sixty-one (1861)."

"We should now * * * vastly prefer to have that [Marcy] amendment accepted. Nevertheless, if this can not be done, let the convention be made for adherence to the declaration, pure and simple." (Mr. Seward, Sec. of State, to Mr. Sanford, min. to Belgium, No. 9, June 21, 1861, Dip. Cor. 1861, 43.)

"There is no reservation or difficulty about their application [i. e., the application of the rules of the Declaration of Paris] in the present case. We hold all the citizens of the United States, loyal or disloyal, alike included by the law of nations and treaties; and we hold ourselves bound by the same obligations to see, so far as may be in our power, that all our citizens, whether maintaining this Government or engaged in overthrowing it, respect those rights in favor of France and of every other friendly nation. In any case, not only shall we allow no privateer or national vessel to violate the rights of friendly nations as I have thus described them, but we shall also employ all our naval force to prevent the insurgents from violating them just as much as we do to prevent them from violating the laws of our own country."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 19, June 17, 1861, Dip. Cor. 1861, 208, 211–212.

"You seem to us to have adopted the idea that the insurgents are necessarily a belligerent power because the British and French Governments have chosen in some of their public papers to say they are so. * * * Our view is on the contrary. * * * We do not admit, and we shall never admit, even the fundamental statement you assume, namely, that Great Britain and France have recognized the insurgents as a belligerent party. True, you say that they have so declared. We reply: Yes, but they have not declared so to us. You may rejoin: Their public declaration concludes the fact. We nevertheless reply: It must be not their declarations, but their action that shall conclude the fact. That action does not yet appear, and we trust, for the sake of harmony with them and peace throughout the world, that it will not happen." (Mr. Seward, Sec. of State, to Mr. Dayton, No. 24, "strictly confidential," July 1, 1861, MS. Inst. France, XVI. 16.)

Mr. Dayton, American minister at Paris, acting upon the circular instruction of April 24, 1861, brought the views therein expressed to the attention of Mr. Thouvenel, minister of foreign affairs of France, in a personal interview. Some correspondence then took place, and on the 31st of May Mr. Dayton, in view of the fact that, since the circular was written, the belligerency of the Confederate States had been acknowledged by England and France, proposed the accession of the United States to the Declaration of Paris, not pure and simple, but with the Marcy amendment.

Writing to Mr. Dayton on July 6, 1861, Mr. Seward observed that what was directed to be proposed to France in the circular of April 24 was "equally and simultaneously proposed to every other maritime power." Understanding, said Mr. Seward, that an attempt to obtain the acceptance of the Marcy amendment "would require a negotiation not merely with France alone, but with all the other original parties of the Congress of Paris, and every government that has since acceded to the declaration," as well as the unanimous consent of all those powers, the United States had decided to offer to adhere to the declaration, pure and simple. "In this way," declared Mr. Seward, "we expected to remove every cause that any foreign power could have for the recognition of the insurgents as a belligerent power." Continuing, Mr. Seward said:

"We shall not acquiesce in any declaration of the Government of France that assumes that this Government is not now, as it always has been, exclusive sovereign, for war as well as for peace, within the States and Territories of the Federal Union, and over all citizens, the disloyal and loyal all alike. We treat in that character, which is our legal character, or we do not treat at all, and we in no way consent to compromise that character in the least degree; we do not even suffer this character to become the subject of discussion. Good faith and honor, as well as the same expediency which prompted the proffer of our accession to the Declaration of Paris, pure and simple, in the first instance, now require us to adhere to that proposition and abide by it; and we do adhere to it, not, however, as a divided, but as an undivided nation. The proposition is tendered to France not as a neutral but as a friend, and the agreement is to be obligatory upon the United States and France and all their legal dependencies just alike.

"The case was peculiar, and in the aspect in which it presented itself to you portentous. We were content that you might risk the experiment, so, however, that you should not bring any responsibility for delay upon this Government. But you now see that by incorporating the Marcy amendment in your proposition, you have encountered the very difficulty which was at first foreseen by us. The following nations are parties to the Declaration of Paris, namely: Baden, Bavaria, Belgium, Bremen, Brazils, Duchy of Brunswick, Chili, the Argentine Confederation, the Germanic Confederation, Denmark, the Two Sicilies, the Republic of the Equator, the Roman States, Greece, Guatemala, Hayti, Hamburg, Hanover, the two Hesses, Lübeck, Mecklenburgh Strelitz, Mecklenburgh Schwerin, Nassau, Oldenburgh, Parma, Holland,[1] Peru, Portugal, Saxony,

[1] I. e., the Netherlands.

Saxe Altenburgh, Saxe Coburg Gotha, Saxe Meiningen, Saxe Weimar, Sweden,[1] Switzerland, Tuscany, Wurtemberg, Anhault Dessau,[2] Modena, New Granada, and Uruguay.[3]

"The great exigency in our affairs will have passed away—for preservation or destruction of the American Union—before we could bring all these nations to unanimity on the subject, as you have submitted it to Mr. Thouvenel. It is a time not for propagandism, but for energetic acting to arrest the worst of all national calamities. We therefore expect you now to renew the proposition in the form originally prescribed. But in doing this you will neither unnecessarily raise a question about the character in which this Government acts (being exclusive sovereign), nor, on the other hand, in any way compromise that character in any degree. Whenever such a question occurs to hinder you, let it come up from the other party in the negotiation. It will be time then to stop and wait for such further instructions as the new exigency may require.

"One word more. You will, in any case, avow our preference for the proposition with the Marcy amendment incorporated, and will assure the Government of France that whenever there shall be any hope for the adoption of that beneficent feature by the necessary parties, as a principle of the law of nations, we shall be ready not only to agree to it, but even to propose it, and to lead in the necessary negotiations.

"This paper is, in one view, a conversation merely between yourself and us. It is not to be made public. On the other hand, we confide in your discretion to make such explanations as will relieve yourself of embarrassments, and this Government of any suspicion of inconsistency or indirection in its intercourse with the enlightened and friendly Government of France."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 27, July 6, 1861, Dip. Cor. 1861, 215.

See Mr. Dayton to Mr. Seward, No. 12, June 22, 1861, Dip. Cor. 1861, 213. It may be observed, however, that in the place here cited only brief extracts from Mr. Dayton's dispatch are printed, insufficient to disclose the action he had taken. It appears by a note of Mr. Dayton to the minister of foreign affairs of Aug. 2, 1861, that he had on the 31st of May proposed the accession of the United States with the Marcy amendment. (Dip. Cor. 1861, 223.)

See, also, Mr. Dayton to Mr. Seward, No. 15, July 5, 1861, Dip. Cor. 1861, 218.

On August 2, 1861, Mr. Dayton, who had then received Mr. Seward's No. 27, of July 6, 1861, wrote to the French minister of foreign affairs, offering the unconditional adhesion of the United States to the Declaration of Paris.

On the 20th of August, M. Thouvenel, who was acting in concert with Lord John Russell, inclosed to Mr. Dayton the text of a written declaration which he proposed to make, on signing the convention concerning the declaration of Paris. The proposed declaration read as follows: "In affixing his signature to the convention * * * the undersigned declares, in execution of the orders of the Emperor, that the Government of His Majesty does not intend to undertake, by the said convention, any engagement of a nature to implicate it, directly or indirectly, in the internal conflict now existing in the United States."

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[1] I. e., Sweden and Norway.
[2] I. e., Anhalt-Dessau-Coethen.
[3] Frankfort should be added to the list. See supra, p. 562.

In a personal interview with Mr. Dayton, M. Thouvenel explained that his reason for intending to make this declaration was that the provisions of the convention might be construed by the United States as binding the English and French Governments to pursue and punish Confederate privateers as pirates, and it was deemed necessary to repel this inference. Mr. Dayton objected to the proposed declaration, and intimated that he might be under the necessity of referring the matter to his Government.

Mr. Dayton, min. to France, to Mr. Seward, Sec. of State, No. 24, Aug. 2, 1861, Dip. Cor. 1861, 222–224.
See, also, same to same, No. 35, Aug. 22, 1861, and No. 37, Aug. 29, 1861, Dip. Cor. 1861, 226–228, 228–231.

On August 17, 1861, Mr. Dayton was instructed to suspend negotiations till the result should be known of the request which Mr. Adams had been instructed to make for "explanations" from Lord John Russell.

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 41, Aug. 17, 1861, Dip. Cor. 1861, 224.
See, also, same to same, No. 53, Sept. 5, 1861, id. 231.

"The obscurity of the text of the declaration which Mr. Thouvenel submits to us is sufficiently relieved by his verbal explanations. * * * He said * * * that we could deal with these people as we choose, and they (England and France) could only express their regrets on the score of humanity if we should deal with them as pirates, but that they could not participate in such a course. * * * France declines to receive that adhesion [of the United States to the Declaration of Paris], unless she be allowed to make a special declaration, which would constitute an additional and qualifying article, limiting the obligations of France to the United States to a narrower range than the obligations which the United States must assume towards France and towards every other one of the forty-six sovereigns who are parties to it, and narrower than the mutual obligations of all those parties, including France herself. * * *

"I know that France is a friend, and means to be just and equal towards the United States. I must assume, therefore, that she means not to make an exceptional arrangement with us, but to carry out the same arrangement in her interpretation of the obligations of the Declaration of the Congress of Paris in regard to other powers. Thus carried out, the Declaration of Paris would be expounded so as to exclude all internal conflicts in states from the application of the articles of that celebrated declaration. Most of the wars of modern times—perhaps of all times—have been insurrectionary wars, or "internal conflicts." If the position now assumed by France should thus be taken by all the other parties to the declaration, then it would follow that the first article of that instrument, instead of being, in fact, an universal and effectual inhibition of the practice of privateering, would abrogate it only in wars between foreign nations, while it would enjoy universal toleration in civil and social wars. * * *

"I can not, indeed, admit that the engagement which France is required to make without the qualifying declaration in question would, directly or indirectly, implicate her in our internal conflicts.

But if such should be its effect, I must, in the first place, disclaim any desire for such an intervention on the part of the United States. The whole of this long correspondence has had for one of its objects the purpose of averting any such intervention. If, however, such an intervention would be the result of the unqualified execution of the convention by France, then the fault clearly must be inherent in the Declaration of the Congress of Paris itself, and it is not a result of anything that the United States have done or proposed. * * *

"You will inform Mr. Thouvenel that the proposed declaration on the part of the Emperor is deemed inadmissible by the President of the United States; and if it shall be still insisted upon, you will then inform him that you are instructed for the present to desist from further negotiation on the subject involved."

Mr. Seward, Sec. of State, to Mr. Dayton, min. to France, No. 56, Sept. 10, 1861, Dip. Cor. 1861, 233.

See M. Thouvenel to Mr. Dayton, Sept. 9, 1861, formally stating the specific grounds of exception to the unconditional adhesion by the United States to the Declaration of Paris, under the conditions then existing. He maintained that such a reservation as he proposed was essential, since the Cabinet of Washington might "be led, by the particular point of view in which it is placed, to draw from the act which we are ready to conclude such consequences as we should now absolutely reject." (Dip. Cor. 1861, 236, 237.)

Mr. Dayton communicated to M. Thouvenel a copy of Mr. Seward's No. 56, of Sept. 10, 1861. M. Thouvenel merely acknowledged its receipt, thus tacitly treating the negotiation as closed. (Dip. Cor. 1861, 238, 239.)

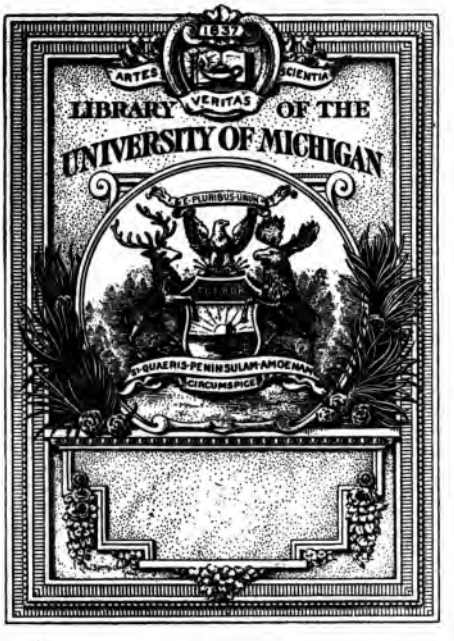
In a similar sense, see Mr. Seward, Sec. of State, to Mr. Dayton, No. 187, April 8, 1862, MS. Inst. France, XVI. 137.

On July 11, 1861, Mr. Adams, American minister in London, formally proposed to Lord John Russell the conclusion of a convention for the adhesion of the United States to the Declaration of Paris. On the 18th of July, Lord John Russell, in reply, stated that the mode of adhering to the declaration by those who were not originally parties to it was by simple notification, and that as the object of the declaration was to obtain a general concurrence upon questions of maritime law, it embraced various powers and did not contemplate an insulated engagement between only two of them; but he added that, if Her Majesty's Government should be assured that the United States were ready to enter into a similar engagement with France and the other maritime powers, they would, in order to save time, advise the Queen to enter into a convention on the subject so soon as they should be informed that a similar convention was ready for signature between the United States and France, so that they might be signed simultaneously.

Adams, min. to England, to Mr. Seward, Sec. of State, No. 17, July 19, 1861, and accompanying correspondence, Dip. Cor. 1861, 97–100.

also, Mr. Adams to Mr. Seward, No. 2, May 21, 1861, Dip. Cor. 1861, 74, 75; Mr. Seward to Mr. Adams, No. 32, July 1, 1861, id. 95; Mr. Adams to Mr. Seward, No. 20, July 26, 1861, id. 105.

On July 29, 1861, Mr. Adams informed Lord John Russell that he had been in correspondence with Mr. Dayton, at Paris, and that Mr. Dayton had desired to ascertain whether perseverance in the attempt to secure the Marcy amendment would be fruitless in England. Mr. Adams said that he had expressed to Mr. Dayton the belief that it would be so, and he wished to learn whether this view was correct.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of nations in collision shall be exempted from confiscation equally in warfare waged on the land and in warfare waged upon the seas, which are the common highways of all nations.

"Regarding this negotiation as at an end, the question arises, what, then, are to be the views and policy of the United States in regard to the rights of neutrals in maritime war in the present case. My previous despatches leave no uncertainty upon this point. We regard Great Britain as a friend. Her Majesty's flag, according to our traditional principles, covers enemy's goods not contraband of war. Goods of Her Majesty's subjects, not contraband of war, are exempt from confiscation, though found under a neutral or disloyal flag. No depredation shall be committed by our naval forces or by those of any of our citizens, so far as we can prevent it, upon the vessels or property of British subjects. Our blockade, being effective, must be respected.

"The unfortunate failure of our negotiations to amend the law of nations in regard to maritime war does not make us enemies, although, if they had been successful, we should have perhaps been more assured friends.

"Civil war is a calamity from which certainly no people or nation that has ever existed has been always exempt. It is one which probably no nation ever will escape. Perhaps its most injurious trait is its tendency to subvert the good understanding and break up the relations existing between the distracted state and friendly nations, and to involve them, sooner or later, in war. It is the desire of the United States that the internal differences existing in this country may be confined within our own borders. I do not suffer myself for a moment to doubt that Great Britain has a desire that we may be successful in attaining that object, and that she looks with dread upon the possibility of being herself drawn into this unhappy internal controversy of our own. I do not think it can be regarded as disrespectful if you should remind Lord Russell that when, in 1838, a civil war broke out in Canada, a part of the British dominions adjacent to the United States, the Congress of the United States passed and the President executed a law which effectually prevented any intervention against the Government of Great Britain in those internal differences by American citizens, whatever might be their motives, real or pretended, whether of interest or sympathy. I send you a copy of that enactment. The British Government will judge for itself whether it is suggestive of any measures on the part of Great Britain that might tend to preserve the peace of the two countries, and, through that way, the peace of all nations." (Id. 127.)

As to the signature by Mr. Cassius M. Clay and Prince Gortschakoff, in the autumn of 1861, of a treaty for the amelioration of the rigors of maritime war, and its subsequent postponement and abandonment, by mutual consent of the two Governments, see Mr. Seward, Sec. of State, to Mr. Clay, min. to Russia, No. 19, Oct. 23, 1861, MS. Inst. Russia, XIV. 238; same to same, Nos. 20 and 26, Nov. 9, 1861, and Jan. 8, 1862, id. 239, 244; Mr. Seward, Sec. of State, to Mr. Stoeckl, Russian min., Jan. 8, 1862, MS. Notes to Russian Leg. VI. 114; Mr. Seward, Sec. of State, to Mr. Clay, min. to Russia, No. 32, March 6, 1862, MS. Inst. Russia, XIV. 249.

ARMING OF MERCHANT VESSELS.

[Moore's Digest of International Law, vol. 2, p. 1070.]

"In answer to your request for an expression of opinion in regard to Mr. Ogden's question whether a vessel which he is said to be fitting out for a trading voyage to the South Sea Islands can carry two guns and other arms for protection and defense against the natives, I am not aware of any international prohibition or of any treaty provision which would prevent a vessel trading amid the groups of islands of the South Sea from carrying a couple of guns and arms for the proper and necessary protection of the vessel against violence on the part of the lawless or partially civilized communities or of the piratical crews which are represented to occasionally frequent those waters, providing always that the vessel carrying such guns and arms itself be on a lawful voyage and be engaged in none other than peaceful commerce, and that such guns and arms be intended and be used solely for the purpose of defense and of self-protection."

Mr. Fish, Sec. of State, to Mr. Morrill, Feb. 8, 1877, 117 Dom. Let. 54.

"A copy of your No. 23, of the 10th instant, in regard to the case of the American schooner *Water Witch*, which arrived in Haytian waters with two cannon and sixty pounds of powder on board, having been transmitted to the Secretary of the Treasury, that official has replied to your inquiry whether sailing vessels of the United States are allowed to carry any armament, as ship's stores or otherwise, that the laws do not forbid the carrying of articles of the character mentioned, provided there shall be no violation of Chapter LXVII of the Revised Statutes."

Mr. Gresham, Sec. of State, to Mr. Smythe, Min. to Hayti, Jan. 31, 1894. For. Rel. 1894, 337, MS. Inst. Hayti, III, 375.

Chap. LXVII, R. S., embracing articles 5281–5291, relates to neutrality. Sec. 5289 reads as follows:

"Sec. 5289. The owners of consignees of every armed vessel sailing out of the ports of the United States, belonging wholly or in part to citizens thereof, shall, before clearing out of same, give bond to the United States, with sufficient sureties, in double the amount of the value of the vessel and cargo on board, including her armament, conditioned that the vessel shall not be employed by such owners to cruise or commit hostilities against the subjects, citizens, or property of any foreign prince or state, or of any colony, district, or people, with whom the United States are at peace."

It should also be borne in mind that a merchant vessel using arms for acts of destruction on the high seas, unless duly commissioned for the purpose, may expose herself to a charge of piracy.

ARTICLE 1. A merchant ship converted into a warship can not have the rights and duties accruing to such vessels unless it is placed under the direct authority, immediate control, and responsibility of the power whose flag it flies.

ART. 2. Merchant ships converted into warships must bear the external marks which distinguish the warships of their nationality.

ART. 3. The commander must be in the service of the State and duly commissioned by the competent authorities. His name must figure on the list of the officers of the fighting fleet.

ART. 4. The crew must be subject to military discipline.

ART. 5. Every merchant ship converted into a warship must observe in its operations the laws and customs of war.

ART. 6. A belligerent who converts a merchant ship into a warship must, as soon as possible, announce such conversion in the list of warships.

ART. 7. The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.

RATIFICATIONS, ADHESIONS, AND RESERVATIONS.

The foregoing convention was ratified by the following signatory powers on the dates indicated:

Austria-Hungary, November 27, 1909; Belgium, August 8, 1910; Brazil, January 5, 1914; Denmark, November 27, 1909; France, October 7, 1910; Germany, November 27, 1909; Great Britain, November 27, 1909; Guatemala, March 15, 1911; Haiti, February 2, 1910; Japan, December 13, 1911; Luxemburg, September 5, 1912; Mexico, November 27, 1909; Netherlands, November 27, 1909; Norway, September 19, 1910; Panama, September 11, 1911; Portugal, April 13, 1911; Roumania, March 1, 1912; Russia, November 27, 1909; Salvador, November 27, 1909; Siam, March 12, 1910; Spain, March 18, 1913; Sweden, November 27, 1909; and Switzerland, May 12, 1910.

Adhesions: Liberia, February 4, 1914; and Nicaragua, December 16, 1909.

The following powers signed the convention, but have not yet ratified:

Argentine Republic, Bolivia, Bulgaria, Chile, Colombia, Cuba, Ecuador, Greece, Italy, Montenegro, Paraguay, Persia, Peru, Servia, Turkey, and Venezuela.

Reservation: (This reservation was made at signature.) Turkey. Under reservation of the declaration made at the eighth plenary session of the conference of October 9, 1907.

[Extract from the procès-verbal.]

The Imperial Ottoman Government does not engage to recognize as vessels of war ships which, being in its waters or on the high seas under a merchant flag, are converted on the opening of hostilities. (Actes et documents, vol. i, p. 277.)

Criteria of a war vessel.

	Italy.	Netherlands.	Russia.	United States.
Command	Officer of the navy.	Military commander.	Naval officer in active service.	Regularly commissioned officer.
Crew	Subject to all rules of military discipline.	Military crew wholly or in part.	Subject to all military laws.	Subject to military law and discipline.
Registration	.....	.....	In the list of warships.	
Flag	.....	Naval ensign and pennant at bow and masts.	Naval ensign	
Ship's papers	.....	Commission from the competent national authorities.	.....	
Compliance with laws and customs of war.	.....	Yes	.....	

Great Britain: A warship is every vessel which sails under a recognized flag and which has been armed at the expense of the State for use against the enemy, and whose officers and crew have been commissioned by their competent authorities for that purpose. A vessel may receive this character only before sailing from a national port, and may give it up only after the return into a national port. An auxiliary cruiser is every enemy or neutral merchant ship which is used for the transportation of marines, munitions of war, fuel, foodstuffs, water, or other ammunitions of war for a fleet, or which is commissioned to make repairs, to deliver dispatches, or for reconnoitering, in so far as it must follow the sailing directions directly or indirectly given to it by the navy. This definition covers also every vessel which is used for the transportation of troops.

(Source: Kriege, Dr. Walter. "Die Umwandlung von Kauffahrteischiffen in Kriegschiffe." In Niemeyer's Zeitschrift für Internationales Recht., v. 26, no. 1–2, Munchen, 1915.)

Germany: The necessary characteristics of warships are: The naval ensign (as a rule, the pennant), a Government-appointed commander whose name is entered on the service list of the navy, and a crew under military decipline. (See secs. 2, 4, and 6 of Agreement VII, of the second Hague conference.) (From chap. 1, sec. 2, of the German Prize Law, of Sept. 30, 1909, promulgated Aug. 3, 1914.)

ARMED MERCHANT SHIPS.

[Reprinted from vol. 8, American Journal of International Law.]

I.

INTRODUCTORY.

So long as the rule of capture of private property at sea exists unimpaired, states with mercantile marines of any importance will find that one of the problems they have to face in war is to defend their sea-borne commerce, and to attack that of their adversary. On the 26th March, 1913, Mr. Winston Churchill, the First Lord of the British Admiralty, made an important statement in the House of Commons regarding the methods proposed by Great Britain for the protection of trade. As reported in the Times Mr. Churchill's speech was as follows:

I now turn to one aspect of trade protection which requires special reference. It was made clear at the Second Hague Conference and the London Conference that certain of the great Powers have reserved to themselves the right to convert merchant steamers into cruisers, not merely in national harbours but if necessary on the high seas. There is now good reason to believe that a considerable number of foreign merchant steamers may be rapidly converted into armed ships by the mounting of guns. The sea-borne trade of the world follows well-marked routes, upon nearly all of which the tonnage of the British mercantile marine largely predominates. Our food-carrying liners and vessels carrying raw material following these trade routes would, in certain contingencies, meet foreign vessels armed and equipped in the manner described. If the British ships had no armament they would be at the mercy of any foreign liners carrying one effective gun and a few rounds of ammunition. It would be obviously absurd to meet the contingency of considerable numbers of foreign armoured merchant cruisers on the high seas by building an equal number of cruisers. That would expose this country to an expenditure of money to meet a particular danger altogether disproportionate to the expense caused to any foreign Power in creating that danger. Hostile cruisers, wherever they are found, will be covered and met by British ships of war, but the proper reply to an armed merchantman is another merchantman armed in her own defence. This is the position to which the Admiralty have felt it necessary to draw the attention of leading shipowners. We have felt justified in pointing out to them the danger to life and property which would be incurred if their vessels were totally incapable of offering any defence to an attack. The shipowners have responded to the Admiralty invitation with cordiality, and substantial progress has been made in the direction of meeting it as a defensive measure by preparing to equip a number of first-class British liners to repel the attack of an armed foreign merchant cruiser. Although these vessels have, of course, a wholly different status from that of the regularly-commissioned merchant cruisers such as those we obtain under the Cunard agreement, the Admiralty have felt that the greater part of the cost of the necessary equipment should not fall upon the owners, and we have decided, therefore, to lend the necessary guns, to supply ammunition, and to provide for the training of members of the ship's company to form the guns' crews. The owners on their part are paying the cost of the necessary structural conversion, which is not great. The British mercantile marine will, of course, have the protection of the Royal Navy under all possible circumstances, but it is obviously impossible to guarantee individual vessels from attack when they are scattered on their voyages all over the world. No one can pretend to view these measures without regret or without hoping that

the period of retrogression all over the world which has rendered them necessary may be succeeded by days of broader international confidence and agreement than those through which we are now passing.

On the 15th April, 1914, it was stated in the Morning Post that a bill for the establishment of a mail line of armed vessels to South American ports had been introduced into the United States Senate, with the approval of Mr. Daniels, Secretary of the Navy. It would appear that the United States is going further even than the British Admiralty in establishing a state-owned line of armed mail steamers, and it is of interest to note that that Government is also turning its attention to the South American trade routes, as it was on ships of the R. M. Steam Packet Company on this route that guns for defence were first placed. There are now between 40 and 50 British merchant ships carrying guns for defence and others are in progress of being equipped. It has also been stated that German merchant ships are being similiarly armed.[1]

The reasons for this reversion to a means of defending commerce by arming the ships engaged in trade, a development justly characterised by Mr. Churchill as regrettable and retrogressive, are to be found in the methods in which states have, since the abolition of privateering, arranged to increase their fighting forces on the outbreak of war by the conversion of certain specially built merchant ships into fast cruisers, and to the fact that several important naval Powers maintain the right to convert these merchant ships into ships of war on the high seas. There are, therefore, on all the great trade routes of the world, merchant ships which may at a moment's notice, on receipt of a wireless message, change their peaceful character and from being commercial vessels become commerce destroyers.

This is not the place to deal with the arguments for and against the legality of such conversion. We can only take note of the fact that the Hague Convention of 1907, for the conversion of merchant ships into war ships, and the London Naval Conference of 1908–9, left the whole question of the place of conversion open.[2] The possibility of conversion on the high seas is undoubtedly a serious menace to great trading states such as Great Britain and the United States, both of whom deny the legality of such conversion. They have, however, to face the facts and take such measures in the defence of their sea-borne trade as shall best ensure its continuance in time of war. Already the naval charges of many states impose burdens on their peoples of increasing hardship, and instead of a great increase of cruisers for commerce protection, Great Britain, reverting to a practice common in the eighteenth and early nineteenth centuries, is arming her merchant ships in order that they may offer resistance to, and defend themselves against, the converted merchant cruisers of her potential adversaries. Mr. Churchill expressly stated in the House of Commons in introducing the Naval Estimates for the present year that instructions are given to the armed merchant ships to attempt no resistance to the ordinary ships of war, but only to endeavour to ward off attacks of the converted merchant cruiser. The armed merchant ship is therefore armed solely for defence, not for attack.

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[1] See Morning Post, 16 April, 1914, "Merchantmen in war time," where a list of British ships already armed is given.

[2] See "The Conversion of merchant ships into war ships" in the writer's War and the Private Citizen (1912), 113–165.

II.

USE OF MERCHANT SHIPS IN WAR.

The laws of naval warfare are drawn almost entirely from the practice of states in the past. In considering, therefore, the position of the defensively armed and uncommissioned merchant ship, it is the customary law of nations that is of chief importance. The position of these ships and their treatment in the past must therefore be first considered.

THREE CLASSES TO BE DISTINGUISHED.

Three classes of armed merchant ships may be distinguished in the naval wars of the seventeenth and eighteenth and early nineteenth centuries.

(1) *Merchant ships hired or bought by the state for incorporation temporarily or permanently into the navy.*—From time to time states made up deficiencies in their naval forces by hiring or purchasing strongly built and fast sailing merchantmen. The Dutch in 1652 made up this deficiency in their navy by hastily arming merchantmen, the French did the same in the eighteenth century, and this was also done by England. The merchant captains were frequently left in command and were often part owners, with the result that they were reluctant to risk their ships. This reluctance was in no small degree responsible for the defeat of the English fleet off Dungeness on the 30th November 1652. To remedy this the Laws of War and Ordinances of the Sea published on the 25th December 1652 (the first Articles of War to which the English Navy was subjected) rendered the captains and ships' companies displaying reluctance to engage, and those guilty of slackness in defending a convoy, liable to the penalty of death. It was further ordered that captains of hired ships should be "chosen and placed by the state," and other officers were "likewise to be approved of."[1] These vessels were in all respects men-of-war and call for no further consideration.

(2) *Privateers.*—The terms "privateer" or "private men of war," and "letter of marque ships" were in the latter part of the eighteenth century convertible. "Privateer" does not appear in use till the time of Pepys, and in 1718 it is not used in the issue of "Instructions for such merchants and others who shall have letters of marque or Commission for Private men of War against the King of Spain." There was at one time in England a distinction between privateer and merchant vessels furnished with letters of marque "the one being entitled to head money, and the other not, but" said Sir W. Scott in the *Fanny* (1814) "that distinction has been entirely done away with."[2] Privateers were vessels owned and manned by private persons but granted the authority of the state to carry on hostilities; they were used to increase the naval force of a state, "by causing vessels to be equipped from private cupidity, which a minister might not be able

[1] J. R. Tanner in Cambridge Mod. Hist., IV, 474.

[2] 1 Dods. 443. Head money was paid to encourage ships of war and privateers to attack warships and privateers of the enemy. There was a tendency to seek out rich merchantmen on account of their value in prize money, and by the Prize Act, 1805 (Sec. 5), £5 was paid for every man who was living on board the ship which was taken, sunk, burnt or otherwise destroyed at the beginning of the attack. Originally it was the reward of actual combat only; later, of the capture alone, whether with or without actual fighting. (The *Clorinde*, 1 Dods. 436.)

to obtain by general taxation without much difficulty."[1] In practice any prizes they captured were adjudged to their owners. British revenue cutters, though fitted out, manned and armed at the expense of the Government, were given letters of marque and were held to be private ships of war.[2] Privateers did not confine themselves to attacks on the enemy's commerce; in many cases they combined this with trading;[3] thus East Indiamen were usually furnished with letters of marque, not for the purpose of enabling them to defend themselves, but to ensure to the owners and crew, prize money and head money in case they captured their assailant.

The learning on the subject of privateers, of which there is a large body, may, however, since the Declaration of Paris, 1856, by which "privateering is and remains abolished," be considered as obsolete as between the parties to the Declaration. Their modern substitutes, the converted merchant cruiser, are of a very different character, and, as between the parties to the Sixth Hague Convention, 1907, and so far as they conform to its terms, are on the same footing as warships and subject to the "direct authority, immediate control and responsibility of the Power whose flag they fly" (Art. 1).[4]

(3) *The defensively armed but uncommissioned merchant ship.*—The practice of ships arming in self-defence is a very old one. The seas were often infested with pirates, and when later, privateering was the normal method of attacking commerce, merchant ships were forced either to sail in convoys or to arm themselves; often they did both. Ships sailing on the Indian and American voyages, and even those in the Levant trade, carried large crews, heavy guns and a complete equipment.[5]

But in the seventeenth century arming was made compulsory in England. A proclamation of Charles I of 1625 appears to be one of the earliest orders issued in England, compelling merchant ships to arm in their own defence. The most important order, and one to which reference was frequently made on subsequent occasions during the seventeenth and eighteenth centuries, was an Order in Council of Charles II of the 4th December, 1672, which was made at a meeting at which the King and 26 members were present. Its importance warrants its being set forth in full:

His Majesty having taken into his consideration of what ill consequences and loss it is, as well to the whole kingdom, as to the persons particularly concerned that merchant ships going out on foreign voyages in time of war are not sufficiently provided with guns, fire arms and other necessaries for their defence against the enemy, as well also that such ships are found frequently to forsake their convoys and the rest of their company, by which means it often happens that they fall into the hands of the enemy—It was this day ordered by His Majesty in Council, that all masters of vessels going out on any foreign voyage, as aforesaid, shall before they be cleared at the Custom house or permitted to sail out of any port of this kingdom on their respective voyages give good security to the Commissioners and officers of His Majesty's Customs that they will not separate or depart from such men of war as shall be by His Majesty appointed for their convoy, nor from the rest of their company, but that they will keep together during such their voyage, and mutually assist and defend each other against any enemy to the utmost of their power, in case they shall happen to be attacked, and that to this end they will take care their

[1] W. O. Manning, Law of Nations (1875), 157.
[2] The *Helen*, 3 C. Rob. 224; the *Sedulous*, 1 Dods. 253.
[3] E. g. the *Fanny*, 1 Dod. 448.
[4] For commentary on the convention, see the writer's Hague Peace Conferences, 315-321, and War and the Private Citizen, 130-136.
[5] J. R. Tanner, Camb. Mod. Hist., IV, 467.

respective ships and vessels shall be well provided with muskets, small shot, hand grenades and other sorts of ammunition and military provisions according to the proportion of the men they carry. And of this His Majesty's pleasure the Commissioners and officers of His Majesty's Customs, and all others whom it may concern are to take notice and have due regard thereto accordingly.

Several times during the course of the eighteenth century, merchant ships were ordered to arm in self-defence, so as to avoid the necessity of sailing with convoys. In order to ascertain that no ammuition was sold and that the ship fought only in self-defence, the master had to account for any expenditure of ammunition. Owing to the great demand for sailors to man the fleet during the Napoleonic era, a demand which was enforced by empressment, there was a lack of able-bodied seamen for ships of the British mercantile marine; compulsory arming fell in abeyance, and compulsory convoy was enforced. Still, many ships carried arms for their own defence, and ships so armed were distinguished carefully by prize courts from those with letters of marque. The British prize court stated in one case—"They may be armed only for their own defence: as they have no commission to act offensively they cannot be considered legally as ships of war, to the effect of entitling the captors to head money."[1] And in 1815 Chief Justice Marshall, of the United States Supreme Court, said "In point of fact, it is believed that a belligerent merchant vessel rarely sails unarmed. * * * A belligerent has a perfect right to arm in her own defence."[2]

It is thus clear that up to the end of the Napoleonic wars merchant ships either were compelled to arm in self-defence or armed in order to resist capture.[3]

III.

LEGAL QUESTIONS RAISED BY ARMING MERCHANT SHIPS IN SELF-DEFENCE.

The situation to-day bears a curious resemblance to that which existed a century ago with, however, certain modifications resulting from the Declaration of Paris, 1856, and the Sixth Hague Convention of 1907 which may be considered as a supplementary and explanatory treaty. Private merchant ships are still constantly hired as transports, though they are not generally armed or commissioned, and, therefore, retain their character of merchant ships. Most states have arrangements whereby in time of war certain vessels armed by private owners, companies or individuals, are taken over by the state and equipped with arms and incorporated into the fighting forces of the state. These vessels take the place of the old letters of marque or private ship of war; but they are no longer fitted out by private

[1] By the court in Several Dutch Schuyts, 6 C. Rob. 48. This was a claim for head money for the capture of armed, but uncommissioned, Dutch transports.

[2] The *Nereide*, 9 Cranch, 388.

[3] The evidence of the arming of merchant ships and of their defending themselves from attack is to be found in such works as R. Beatson's, Naval and Military Memoirs and naval histories in general and in the records preserved in the British Public Record office, Admiralty Secretary "In-letters." Captain B. W. Richmond, R. N., has kindly given me references to several cases, such as the despatch from Admiral Sir Chaloner Ogle of 1st December, 1743, the capture of the San Domingo Convoy on 20th June 1747, the action between Commodore Barnett and three French China merchant ships on 25 January, 1745 (see Beatson, I, 258). In the case of the San Domingo Convoy, Beatson gives a list of the captured ships (I, 343) but does not mention whether they were armed or not. The original papers show that with few exceptions all were armed. In the battle of Finisterre, 3 May, 1747 the four armed French East India merchant ships, *Philibert, Apollon, Thétis* and *Dartmouth* sailing under convoy, took part. (Beatson, I, 341.)

owners for their own pecuniary profit, but rank in all respects, when conforming to the Sixth Hague Convention, as public ships of war.

And lastly there is a return to the armed and uncommissioned merchant ship, not armed compulsorily under an Order in Council, but armed at the expense of the state, by the willing co-operation of the owners. We may not improbably see also in the next great naval war a return to the convoy system.

I am not concerned here with the policy, expediency or efficacy of the method which Great Britain and the United States are adopting as an additional protection to this sea-borne commerce; there are, however, several points of international law in regard to these armed merchant ships which their re-introduction make of practical importance. Those to be dealt with in this paper are (1) The right of such vessels to arm and defend themselves; (2) The consequence of a successful resistance and capture of the assailant; (3) The liability to condemnation of neutral cargoes on board enemy merchant ships.

(1) THE RIGHT OF A MERCHANT SHIP TO ARM IN SELF-DEFENSE—OPINIONS OF PRIZE COURTS IN ENGLAND AND THE UNITED STATES.

It is of interest to note that the late Professor Freeman Snow in his International Law, the second edition of which was published at Washington in 1888, anticipated the action of Great Britain and the United States. He said:

> It may be reasonably expected in coming naval wars that steamers of the great mail lines will be armed so as to defend themselves from attack, rather than seek convoy, and the defence will be legitimately carried to the point of seizure of the attacking vessel, or a recapture if once taken. Without a proper commission a private vessel, however, should act only directly or indirectly on the defensive, and not go out of the way to capture enemy vessels. It cannot, of course, take any belligerent action towards vessels of a neutral Power (p. 83).

This statement may be taken as embodying the rule generally acknowledged by English and American judges and writers. The right of an armed, but uncommissioned, merchant ship to resist is expressly laid down by Sir William Scott (afterwards Lord Stowell) in the *Catherina Elisabeth*:[1]

> If a neutral master attempts a rescue, he violates a duty which is imposed upon him by the law of nations,—to submit to come in for enquiry as to the property of the ship or the cargo, and if he violates that obligation by a recurrence to force, the consequence will undoubtedly reach the property of his owner and it would, I think, extend also to the confiscation of the whole cargo entrusted to his care and thus fraudulently attempted to be withdrawn from the rights of war. With an enemy master the case is very different. No duty is violated by such an act on his part—*Lupum auribus teneo*—and if he can withdraw himself he has a right so to do.

The following extracts from the judgment of Chief Justice Marshall in the *Nereide*[2] also show that the law of the United States was the same:

> The argument respecting resistance stands on the same ground with that which respects arming. Both are lawful. Neither of them is chargeable to the goods or their owner, where he has taken no part in it. They are incidents in the character of the vessel, and may always occur where the cruiser is belligerent.
>
> The *Nereide* was armed, governed and conducted by belligerents. * * * It is true that on her passage she had a right to defend herself, did defend her-

[1] 5 C. Rob. 232. [2] 9 Cranch, 388.

self and might have captured an assailing vessel; but to search for the enemy would have been a violation of the charter party and of her duty.

MODERN NAVAL WAR CODES.

The right of resistance of merchant ships is recognized either directly or inferentially by the following national codes or naval instructions:

The U. S. Naval War Code, 1900, Article 10, paragraph 3: The personnel of merchant vessels of an enemy, who in self-defence and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war.

The Italian Codice per la Marine Mercantile, 1877 Article 209: Merchantmen, on being attacked by other vessels, including war vessels, may defend themselves against and even seize them.

The Russian Prize Regulations, 1895, Article 15: The right to stop, examine, and seize hostile or suspected vessels and cargoes belongs to the ships of the Imperial Navy. Vessels of the mercantile navy have a right to do so only (1) when they are attacked by hostile or suspected vessels.

OPINIONS OF INTERNATIONAL LAWYERS.

This rule is also recognized by writers of weight and authority in Great Britain,[1] the United States,[2] France,[3] Italy,[4] Belgium[5] and Holland.[6]

Lastly, the Institute of International Law at its meeting at Oxford in 1913, by Article 12 of the Manuel des lois de la guerre maritime, which it then adopted, laid down the following rule:

La course est interdite. En dehors des conditions determinées aux articles 5 et suivants, les navires publics et les navires privés, ainsi que leur personnel, ne peuvent pas se livrer à des actes d'hostilité contre l'ennemi.

Il est toutefois permis aux uns et aux autres d'employer la force pour se défendre contre l'attaque d'un navire ennemi.[7]

The discussion at the Institute showed that there was some opposition to the second paragraph of the article. Professor Triepel, of Berlin, desired to obtain its suppression, on the ground that an enemy merchant ship had no right to resist capture (as distinct from attack),[8] while Professor Niemeyer supported its suppression on a very different ground,[9] viz., that to insert such a provision was equivalent to conceding that a contrary opinion was possible. Ultimately the article was voted by a large majority.

The view unsuccessfully put forward by Professor Triepel at Oxford has since been advanced by Dr. George Schramm, legal adviser to the German Admiralty, in his Das Prisenrecht in seiner neusten Gestalt (1913), pp. 308–310. This author attempts to prove that "from the point of view of the modern law of war there is no legal foundation for the rule allowing a merchant ship to defend itself," and he carries on the same line of thought in regard to the treatment of the crew of such a ship when he says "it would have to be decided whether the hostilities were committed by members of the crew who

[1] Hall, 456; Oppenheim, II, 85; Phillimore, III, sec. 339; Twiss, II, sec. 97.
[2] Snow, 83, 84; Wheaton, sec. 528; Stockton, 179.
[3] De Boeck, De la Propriété privée ennemie, sec. 212; C. Dupuis, Le droit de la guerre maritime (1899), 121.
[4] P. Fiore, secs. 1627, 1698.
[5] E. Nys, III, 181 (1906).
[6] J. H. Ferguson, sec. 225.
[7] Annuaire (1913), 644.
[8] Ibid., 516, 517.
[9] Ibid., 519.

are enrolled in the enemy forces or not. The former would be made prisoners of war, according to the analogous application of Article 3 of the Regulations of the Laws and Customs of Land Warfare; the latter would have forfeited treatment as peaceful subjects of the hostile state, according to usages of war they would be subject to the criminal law of the captor state" (p. 357).

Professor L. Oppenheim has dealt faithfully with Dr. Schramm's views in the Zeitschrift für Völkerrecht for April, 1913.[1] He has written therein what appears to me to be "*une réponse sans replique.*" I do not propose to enter into the details of the arguments advanced. I shall content myself with a summary of what in my opinion is the present position.

The right of a merchant ship to defend herself, and to be armed for that purpose, has not, so far as I am aware, been doubted for two centuries, until the question has again become one of practical importance. The historical evidence of the practice down to the year 1815 is overwhelming. Dr. Schramm, in his elaborate denial of the right, fails to distinguish between the position in which a belligerent war ship stands to an enemy merchant ship, and that in which it stands to a neutral merchant ship. This failure is important, and goes to the root of the matter, for whereas the visit of a belligerent war ship to an enemy merchant ship is, under existing law, merely the first step to capture and is itself a hostile act, and is undertaken solely in order to enable the captor to ascertain that the ship is one which is not exempt by custom, treaty or convention from capture; the visit to a neutral ship, though justified by the fact of the existence of war, is not a hostile act. By long custom a belligerent war ship has a *right* of visit and search of all neutral merchant vessels, and this right is exercised in order to ascertain whether a vessel is in fact neutral, and not engaged in any acts such as attempting to break blockade, the carriage of contraband or the performance of any unneutral service which would justify its detention and condemnation. "It has been truly denominated a right growing out of, and ancillary to the greater right of capture. Where this greater right may be legally exercised without search [as in the case of enemy ships] the right of search can never arise or come into question."[2] A belligerent war ship has a right to capture an enemy merchant ship, and the latter is under no duty to submit; it has a corresponding right to resist capture, which is an act of violence and hostility. By resisting, the belligerent violates no duty, he is held by force and may escape if he can. But forcible resistance, as distinct from flight, on the part of a neutral merchant ship is universally admitted as a just ground for the condemnation of the ship[3] for a neutral is under a duty to submit to belligerent visit.

(2) POSITION OF CREWS OF CAPTURED MERCHANT SHIPS.

Another important point differentiates the neutral from the belligerent merchant ships, namely the position of their crews when the ships are detained. The officers and crew of an enemy merchant ship, even if they offer no resistance to capture, become prisoners of war, while the officers and crew of a neutral do not.

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[1] Die Stellung der feindlichen Kauffahrteischiffe im Seekrieg, vol. 8, pp. 154–169.
[2] Marshall, C. J., in the *Nereide*, 9 Cranch, 388.
[3] See Declaration of London, Art. 63.

The United States Naval War Code in the passage already cited (Article 10) recognizes that the personnel of merchant vessels of an enemy who in self-defence and in protection of the vessel placed in their charge, resist an attack, are entitled, if captured, to the status of prisoners of war, and Dr. F. Perels, who was formerly legal adviser to the German Admiralty, quotes this with approval.[1] But this view is based, according to Dr. Schramm, on a complete misunderstanding of the modern conception of the legal regulations of war as an armed conflict between states. Enemy merchant seamen have, however, for centuries been liable to this treatment, whether they resist capture or not, in consequence of their fitness for use on ships of war,[2] and this fact has an important bearing on the question of their resistance to capture. It may, however, be truly said that by virtue of the Eleventh Hague Convention of 1907, officers and members of the crew of a captured enemy merchant ship who are subjects of the enemy state, are entitled to be released if they give a written promise not to engage while hostilities last, in any service connected with the operations of war (Article 6). But if they refuse to give their parole, and by the laws of some states, such as Spain, they were formerly, at any rate, forbidden to give such promises,[3] they remain prisoners of war; therefore, the crew in defending their ships are defending themselves and their liberty, for release on the terms of the convention is but a modified liberty. The Eleventh Hague Convention recognizes that the crews of merchant ships are liable to be made prisoners of war by providing for their liberation on parole, but Article 8 states that the provisions of the preceding articles allowing release on parole, "do not apply to ships taking part in hostilities." Crews who forcibly resist visit and capture cannot therefore claim to be released—they remain prisoners of war. If an enemy merchant ship is called on to stop, the crew can, if they wish, "submit to capture and thereby have their freedom restricted, or they may resist and as a result be overpowered. In case they choose the latter course, their potential membership turns into actual membership in the armed forces of their state, and if overpowered they become prisoners of war. In case they choose the former course, their merely potential membership in the armed forces of their state remains intact, and they must either give parole or become prisoners of war."[4]

It would appear, however, that this Convention "is only applicable between the contracting Powers, and only if all the belligerents are parties to the Convention" (Art. 9). Among the Great Powers, Russia has not signed, and Italy has not ratified the Convention, and many of the other Powers, e. g., Bulgaria, Greece, Montenegro and Servia have not ratified it. When such a Convention is not legally applicable, any of the belligerents may, of course, mutually agree to its terms being carried into effect.

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[1] "Gegen das Personal der Schiffsbesatzung soll im übrigen eine vorläufige Zurückhaltung an Bord soweit zulässig sein, als dessen Vernehmung für die Feststellung des Tatbestandes erforderlich erscheint, und es soll diesen Leuten eine anständige Behandlung zu teil werden. Dem entsprechen auch die folgenden Festsetzungen in den Artikeln 10 und 11 des N. W. C: (Das Internationale Seerecht, ed. 1903, p. 191).

[2] W. E. Hall, International Law (5 ed.) 407. Hall's note on Bismarck's denial of the right to treat merchant sailors as prisoners of war is emphatic, but, in my opinion by no means too strong. See F. Perels, Das Internationale Seerecht, 191.

[3] J. B. Moore, Digest of International Law, VII, 371.

[4] L. Oppenheim, op. cit., 164.

(3) CREWS OF ARMED MERCHANT SHIPS ARE LAWFUL BELLIGERENTS.

The chief reason why in land warfare special requirements and organization are necessary to confer the privileges of lawful combatants on armed bodies of men, is to ensure that the peaceful artisan or agricultural laborer shall not change his character from day to day. If he is to have the immunities of a non-combatant, that character must be clear and unequivocal. But even in land warfare, Article 2 of the Hague Regulations makes provision for the exceptional case of the spontaneous resistance of the inhabitants of a territory who rise at the approach of an invader, and grants them belligerent rights if they do not comply with all the requirements of Article 1, but only "carry arms openly and respect the laws and customs of war." The crew of a merchant ship is a body of men acting together in defence of their ship and their liberty, a body of identifiable individuals who by the customary law of nations have received combatant privileges when resisting capture by an enemy war ship. They offer a striking analogy to the spontaneous rising of the inhabitants of an unoccupied territory, who have now received by convention the right which merchant sailors have had for centuries.

IV.

A DEFENSIVELY ARMED MERCHANT SHIP, IF ATTACKED, MAY LAWFULLY CAPTURE ITS ASSAILANT.

Should the resistance of the crew of a defensively armed, uncommissioned merchant ship be so successful as to enable them to effect the capture of their assailant, such captured ship is good prize as between the belligerents. But the right of the captors to prize money in respect thereof, is a matter of municipal legislation. The general rule of English law, as stated by an Order in Council of 4 January 1666, was that all ships and goods casually met at sea and seized by any vessel not commissioned do belong to the Lord High Admiral. Some four years later, in order to encourage masters to fight their ships more stoutly against pirates, a statute was passed [22 and 23 Car. II, cap. 9 (1)] modifying this rule and providing that "in case the company belonging unto any English merchant ship shall happen to take any ship, which ship shall first have assaulted them, the respective officers and mariners belonging to the same, shall after condemnation of such ship and goods have and receive to their own proper use such part and share thereof, as is usually practised in private men of war."

The rule of law laid down by the Order in Council of 1666 has been observed in England since that date; such goods and ships taken by uncommissioned ships belong to the Crown as Droits of Admiralty. The present law is contained in the Naval Prize Act, 1864, section 39: "Any ship or goods taken as prize by any of the officers and crew of a ship other than a ship of war of Her Majesty shall, on condemnation, belong to Her Majesty in Her office of Admiralty." The Naval Prize Bill introduced in 1911, and rejected by the House of Lords, contained a similar clause.

The law of France was formerly the same as that of England, but to-day the prize is given to the captor. A similar rule prevails in Holland:[1]

V.

THE POSITION OF NEUTRAL GOODS ON BOARD DEFENSIVELY ARMED MERCHANT SHIPS.

The re-introduction of the armed merchant ship raises another question which is of importance to neutrals, viz., how far a neutral merchant has a right to lade his goods on board an armed enemy vessel, and what will be the consequence of resistance on the part of the enemy master. This question was discussed by the prize courts of Great Britain and the United States during the war of 1812–14. The cases dealing with this matter are the *Fanny*[2] in England and the *Nereide*[3] and the *Atalanta*[4] in the United States. In the *Fanny* neutral goods were laded on an armed merchant ship furnished with letters of marque, the neutral having knowledge of the facts. Sir W. Scott held that a ship furnished with a letter of marque was manifestly a ship of war, and could not be otherwise considered though she acted in a commercial capacity. The mercantile character being superadded did not predominate over or take away the other. A neutral subject was entitled to put his goods on a belligerent merchant vessel, subject to the right of the enemy, who might capture the vessel but who had no right, under the modern practice of civilized states, to condemn the neutral property. Neither would the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that was an event which the merchant could not have foreseen. But if he put his goods on board a ship of force, which he had every reason to presume would be defended against the enemy by that force, the case then became very different. It was clear, he held, that if a party acted in association with a hostile force, and relied upon that force for protection, he was *pro hoc vice* to be considered as an enemy. In the American case of the *Nereide*, which was subsequently affirmed in the *Atalanta*, the court was divided. Five judges sat, two (one of whom was Chief Justice Marshall) decided in favor of the neutral claimant; two (one of whom was Mr. Justice Story), against him, and the majority was obtained by the course of Mr. Justice Johnson, who decided for the neutral on special grounds, though in the *Atalanta* he gave his adherence to the general principle laid down by Marshall, C. J. The dissenting opinion of Story emphasized a fact on which the majority laid

[1] En France, sous l'ancien régime, les prises faites en se défendant étaient acquises à l'amiral "dont la générosité le portait, la plupart du temps, à en faire don au capteur, en récompense de sa bravoure," au témoignage de Valin et d'Emerigon. Aujourd'hui, aux termes de l'art. 34 de l'arrêté du 2 prairial an xi, la prise faite par un bâtiment attaqué qui parvient à s'emparer de l'aggresseur est acquise au capteur; l'art. 34 a été assez fréquemment appliqué par le Conseil des Prises dans les guerres de l'Empire. La même règle est admise, notamment en Hollande." C. De Boeck, Propriété privée, sec. 212. Prof. de Boeck adds the following footnote: "Quant à la prise qu'un navire non commissionné et armé pour sa défense aurait faite en attaquant, elle est bonne quant à l'ennemi, mais confisquée au profit de l'Etat; l'auteur pourra même être poursuivi et condamné comme pirate."

See also Abdy's edition of Kent's International Law, 246; E. Nys, Le Droit International (1906), III, 181.

[2] 1 Dod. 448.

[3] 9 Cranch, 387.

[4] Wheaton Rep. 400. See on this subject Wheaton, Elements, sec. 529 and Dana's note; R. Wildman, Institutes of International Law, II, 126.

no stress, viz., that the vessel was sailing under enemy convoy, and that the claimant, being the charterer of the whole vessel, had bound her to sail under this convoy; that the vessel was captured with the claimant on board, while accidentally separated from the convoy and endeavoring to rejoin it. The case of the *Nereide* differs in an important point from the *Fanny*, in that it appears to have been an uncommissioned armed merchant vessel belonging to a belligerent which resisted capture; whereas the *Fanny* was a commissioned ship of war. The *Nereide*, however, was under enemy convoy, and it is submitted that the dissenting judgment of Story is on the facts of the case more in accord with the principle of unneutral conduct.

Since these cases were decided, the parties to the Declaration of Paris have agreed that neutral goods, with the exception of contraband of war, are not liable to capture under the enemy's flag (Article 3) and that privateering is and remains abolished (Article 1).

It does not appear that there is a definite decision on the question as to the fate of neutral goods laden on a defensively armed and uncommissioned enemy merchant ship either in Great Britain or the United States. Sir W. Scott in the *Catherina Elizabeth* stated that in case of rescue by the capturing ship, neutral goods would be free. Between such an attempt made after capture, and a resistance to capture involving an attempt to take the assailing vessel previous to capture "there does not seem to be a total dissimilitude."[1] It is submitted that in such a case the opinion of the American court in the *Nereide* will probably be that which will be adopted, namely, that neutral goods placed on an uncommissioned armed merchant vessel belonging to a belligerent, and resisting capture, are not subject to condemnation, if the armament be entirely and exclusively the act of the belligerent owner, and the resistance in no degree imputable to the neutral. The Declaration of Paris by abolishing privateering left the status of the merchant ship untouched. The right of an enemy merchant ship to defend herself was unquestioned, as was also her liability to capture. The granting of the right to neutrals to send their goods on belligerent vessels does not deprive the belligerent of his right to resist visit and capture, so long as his ship remains an uncommissioned ship of war, "a ship of force" to use Lord Stowell's expression; but belligerents, by according neutrals the right, have at the same time deprived themselves of the advantage they might once have had of saying that the neutral is in fault and his goods are liable to condemnation, because the cruiser being armed can the better effectuate his right to defeat search or capture. The enemy ship and cargo may still be captured as an act of war, but if the neutral shipper has done no more than send his goods in an enemy vessel, his cargo or its value should be restored.[2]

The majority of the court in the *Nereide* appears to have gone too far in asserting that as all merchant vessels during war are generally more or less armed, it is impossible for a prize court to distinguish between different degrees of armament. There is a great distinction between commissioned and uncommissioned armed merchant vessels; the former may, the latter may not, act on the offensive, and the

[1] The *Nereide*, 9 Cr. 388.
[2] See Dana's note in Wheaton's Elements, sec. 529.

arguments of Sir W. Scott and Mr. Justice Story in regard to the treatment of goods placed on board vessels of the former class may well be accepted, but rejected in the case of the latter, which were not in question. It is submitted therefore that neutral cargoes placed on board merchant vessels converted into war ships under the terms of the Hague Convention of 1907 should be liable to be condemned on the principle laid down by these two distinguished judges, while those placed on armed but uncommissioned merchant ships should, under the Declaration of Paris, be released.

A. Pearce Higgins.

RESISTANCE AGAINST THE LAWFUL EXERCISE OF THE RIGHT OF STOPPAGE, VISIT AND SEARCH, AND CAPTURE.

By Dr GEORGE SCHRAM,

Counselor of the German Imperial Navy Department.

[Translated from his treatise "Das Prisenrecht in seiner neuesten Gestalt" (Berlin, 1913), p. 308–310, by T. H. Tiesing, Legislative Reference Division, Library of Congress.]

A merchant vessel's right of self-defense may not be exercised in the case of any lawful application of the right of visit and search and of seizure. Self-defense is defined as a defense against any unlawful encroachment upon a legal right.

The belligerent, however, acts in the exercise of the right of visit and search and of seizure with recognized, lawful authority; he does not commit an illegal act. Accordingly, the merchant vessel has to suffer this encroachment by the belligerent; an act of defense on the part of the merchant ship would constitute an encroachment upon the legal rights of the belligerent. This applies generally to neutral as well as to enemy merchant ships. The latter have no exceptional status. They do not possess the right of self-defense.

The adverse opinion set forth in the modern literature, especially English and American,[1] which concedes to the crew of a belligerent merchant ship the status of combatants when confronted by an enemy warship, is not only based upon an erroneous appreciation of the modern conception of the legal standardization of war as an armed combat between States, but also, upon a denial of the legal principle which permits only organized forces of States to use arms for offensive purposes in land as well as in sea warfare. This conception is also illogical; for, if enemy merchant ships, which on account of their character as enemy ships, with few exceptions, are liable to capture and seizure, were allowed to resist, then such a permission should with more justification be granted to neutral ships which may freely sail anywhere and which are only under certain conditions—breaking of blockade, carrying of contraband, etc.—liable to capture and, according to circumstances, not always, to seizure. And also those authorities who concede an exceptional status to enemy merchant ships recognize that resistance by force by neutral merchant ships justifies seizure of the ship. It is curious that this conception presented in the literature but lacking any legal basis according to the standpoint of the modern law of war, namely, that belligerent merchant ships have the right of defense against lawful acts of enemy warships, shall be found in the prize laws of some States, e. g., article 209 of the Italian "Codice *per la marina mer-*

[1] Oppenheim, International Law, vol. 2, secs. 85, 181; Stockton, International Law, p. 179.

cantile," of October, 1877, contains the following provision: "Merchant vessels being attacked by other ships, including warships, may defend themselves and may counterattack; they may go to the defense of other national or allied vessels which are being attacked and cooperate with the same in an attack." Article 210 of this Codice generally speaks of a case where an enemy ship should attempt to make a prize within territorial waters of the State. Every national has then the right to arm a vessel in order to come to the assistance of the attacked merchant ship. Also, article 15 of the Russian prize law of March 27, 1895, contains a similar provision. "The right (i. e., of visit and search and capture of merchant ships and their cargo) is not accorded to merchant ships, except in the following cases: (1) When attacked by allied or suspicious ships, and (2) when they come to the assistance of Russian or neutral ships attacked by the enemy." The same view is expressed in the provision of article 10, paragraph 2, of the Naval War Code, which accords to the crew of enemy merchant ships who in self-defense and for the protection of the ship intrusted to them, resisted an attack, the privilege of being treated as prisoners of war in case of capture. In so far as these regulations do not concern the defense against piratical attacks by merchant ships, they lack any legal basis.

The mere attempt by a merchant vessel to escape visit, search, or seizure by flight is not an act of defense in the sense explained above. Therefore it can not entail any legal consequences. The merchant vessel attempting to escape renders herself only suspicious, and may be captured.

Forceful resistance by merchant vessel is in all cases punished by seizure, because it is a violation of the belligerent's legal rights. The practice in modern times is in accordance with this principle—with the above-mentioned exceptions in favor of enemy merchant vessels.

(See sec. 4 and sec. 7, par. 3, of the Prussian prize laws of 1864; sec. 1b and sec. 5b of the Austrian ordinance of 1866; art. 145 of the naval prize law; art. 11 of the Russian prize law of 1895; art. 33, par. 2, of the Naval War Code; sec. 37, par. 6, and sec. 48 of the Japanese naval prize ordinance of 1904.)

It is doubtful in particular cases in what the criterion of forcible resistance consists, especially whether preparations, e. g., equipment of the vessel with suitable armament, would entail the legal consequences of resistance. This question must be answered in the negative. Preparations or the mere attempt to escape do not constitute in themselves a forcible defense; they do not encroach upon the legal rights of the belligerent.

ARMED MERCHANTMEN.

By JONKHEER W. J. M. VON EYSINGA, Professor in Leiden University.

[Translated from International Law Association Reports, 1913–1915, with Hague papers, pp. 171–176, by C. C. Rice, Legislative Reference Division, Library of Congress.]

1. By its introduction of armed merchantmen last year, the British Admiralty took a step which may be of the greatest consequence in the development of law and maritime warfare. It is known that the Admiralty turned over to the steamers of several lines a certain number of guns per ship, with ammunition. The Admiralty and other controlling bodies also ordered the requisite training to be given to the crews of these ships. Quite a number of English ships have already been armed thus; and according to a statement made by the First Lord of the Admiralty, Mr. Churchill, in the House of Commons, on March 17, 1914, there will be seventy of these vessels by 1915. (Parliamentary Debates, March 17, 1914, pp. 1921–1922.)

2. If the British Government continues this course of procedure and other Governments follow its leadership, it is plain that the merchant fleet of the world, which hitherto has been peaceful in character, will be largely transformed into an armed navy. The law of modern naval warfare restricting warlike action to warships properly so called will then, by retrogressive evolution, be replaced by a status quo like that of the eighteenth century, when any vessel might turn warship at pleasure.

3. We are not unaware of the assertion of the British Admiralty that merchantmen were armed solely for the purpose of enabling them to resist auxiliary warships which would stop and claim them as prizes, and were not armed with any offensive design; and so the cannon are mounted only at the stern of ships. However, Mr. Churchill, in answer to an interpellation on this matter, had to admit that this location of the guns could not hinder a merchantman from defending herself from an enemy should she be attacked. (House of Commons, Mar. 17, 1914.) But, anyway, it is obvious that English captains are good enough sailors to know that the best self-defense often consists in taking the offensive as quickly as possible, and would they not be good enough patriots in a given case to reenforce an English squadron and attempt to capture a weaker enemy ship or visit a neutral merchantman? If we can scarcely believe that English armed merchantmen will merely defend themselves when an attempt is made to capture them, this notion of ours is confirmed by the fact that in the eyes of the British Goyernment the ships in question will still be merchantmen; or, in other words, it seems inevitably to follow that the Government which has armed them assumes no responsibility for their actions (see the information supplied by Mr.

Churchill in the House of Commons on June 11, 1913). And this complete governmental irresponsibility, which even seems to exceed that of eighteenth-century governments regarding privateers of their nationality, will be still more dangerous in the case of sailors less conscientious than British seamen.

4. Indeed, the development of armed merchantmen as an institution may lead to sorry consequences. As M. Surie,[1] a captain in the Dutch Navy, has well said, they are not given any official character like that which it has been thought necessary to confer upon auxiliary cruisers, as the Government does not even assume any responsibility for their actions; and yet their essential character is that of warships, in that they are not only armed but armed by the Government itself.

5. If the contemporary development of armed merchantmen furnishes no sufficient assurance that these ships will only defend themselves from arrest by an enemy man of war, we may also truly say that the problem of armed merchantmen is not solved by the mere statement that a merchantman has a right to defend herself from arrest by an enemy warship. Nevertheless such a recognized authority as Prof. Oppenheim, of Cambridge, comes to a stop with this mere statement. In fact, his article in the *Zeitschrift für Völkerrecht*, 1914, page 154, makes no mention of the new armed merchantmen, which, notwithstanding, have already occasioned many discussions in the British Parliament, in the Institute of International Law (session of 1913, XXVI, p. 520), and in the magazines and newspapers. Mr. Oppenheim really confines his article to a rebuttal of the thesis defended by Dr. Schramm, councillor to the ministry of the navy at Berlin, in his *Prisenrecht in seiner neuesten Gestalt* (1913); the thesis, viz: That resistance offered by a merchantman to an enemy man of war constitutes an illegal act. But if Mr. Oppenheim allows his readers to draw their own conclusion concerning his view as against Dr. Schramm's opinion, expressing his hope that the Third Peace Conference will add its vote on the matter to that of the Institute of International Law, which in its manual of laws on maritime warfare (1913) has asserted the legality of defense by a merchantman against *attack* (we shall return to this word) by an enemy ship, it is plain that at bottom his article constitutes a defense of the British Admiralty's recent creation, and that in this connection he shares Lord Reay's view. In effect the latter opines that the text cited by the Institute would overcome any objection as to the question of the legality of arming merchantmen without making warships of them. (Session of 1913, p. 520.)

6. We may here observe that Mr. Oppenheim in our opinion has not succeeded in destroying the thesis of Dr. Schramm and those holding that according to the law resistance offered by a merchantman to arrest by an enemy man-of-war is quite as illegal as resistance of any legal arrest, such as, e. g., arrest of a neutral merchantman by an enemy cruiser, which resistance article 63 of the Declaration of London expressly declares illegal. We can not grant Mr. Oppenheim's contention that it is a hostile man-of-war's *duty* to arrest an enemy merchantman, while he has a *right* to arrest a neutral

[1] See the article of M. Surie, who was a specialist delegate at both the Second Peace Conference and the London Conference, in Nieuwe Rotterdamsche Courant, June 10 and 11, 1913.

merchantman; but this specious distinction, even if correct, could in no case change the character of a legitimate performance of police duty, which the arrest of a ship for the purpose of claiming her as a prize amounts to in accordance with the law.

Mr. Oppenheim also endeavors to prove that a merchantman's crew has belligerent character, and therefore has a right to defend itself from attack by a hostile man-of-war. But if a merchantman's crew has belligerent character, why assign to it one of the least of the powers of a belligerent of plain type, viz, solely the right of self-defense? The analogy of article 2 of the regulation concerning the laws and customs of terrestrial warfare, which Mr. Oppenheim uses as a bolster, seems to us inconclusive, inasmuch as the inhabitants under the circumstances provided by this rule have *all* belligerent rights. According to article 2 they may "combat" the enemy, and their action is not restricted to self-defense.

7. If Mr. Oppenheim's argument has not convinced us, it may none the less be granted that opinions may differ as to whether a merchantman has a right to defend herself from an enemy man-of-war desirous of arresting her. But it is not so easily taken for granted that one should merely state that this power exists without inquiring whether such right of self-defense, recently favored and encouraged in a heretofore unheard-of manner by the British Government, which moreover disowns responsibility, is not calculated to produce sorry consequences.

8. We have tried to demonstrate that this is in fact the case, and that if armed merchantmen were to develop in the direction taken by the British Government, we should be harking back to the status antecedent to the great reforms in maritime law. At that time the right of capturing hostile merchantmen was exercised not only by men-of-war but especially by other merchantmen bearing letters of marque. The history of these avaricious privateers is well known, being the history of the arbitrary in its worst forms. It is easy to see why, confronted by many cases of arbitrary seizure, the famous English judge (Scott), in 1804, allowed merchantmen to defend themselves from arrest by a hostile ship. Since then the development of maritime law has excluded arbitrary procedure more and more. The power of arresting merchantmen in particular now belongs only to men-of-war, since privateering has been abolished. Considerable restrictions have been assigned to the right of capture. Though this right still exists it has been subjected to a very strict regulation both as to the arresting man-of-war and as to prize claims. If Lord Stowell were called upon for a decision in 1914, he would doubtless take account of the profound modifications of maritime law accomplished in the last century, and his "res judicatae" of 1804 would doubtless be less authoritative in his eyes than they seem to be in Mr. Oppenheim's.

9. It is difficult to predict what is to be the development of the obscure legal category *ships*. In any case this development will be strongly influenced by the attitude of insurance companies toward armed merchantmen. Just now no other Governments seem as yet to have followed the example of the British Admiralty. Still the number of armed ships sailing under the British flag keeps on increasing, and the other Governments will be constrained by the fact to inquire what shall be their attitude toward these ships both in

time of peace and in time of war. If an English war were to arise, would not neutral powers transgress by admitting armed merchantmen to their ports and waters? What measures will neutral powers be obliged to take in order to prevent these armed ships from assuming the right to enforce restrictive measures on neutral commerce? Does public security allow of admitting armed ships to enter port, even in time of peace, without having unloaded their explosives? And are belligerents to take these armed ships as belligerent ships, or are they to have to treat them otherwise? If so, in what manner?

All these questions and many others would lose their practical significance if a way were found to abolish the institution of armed merchantmen. It will not be an easy matter. But possibly Great Britain might be induced to abandon the course upon which she has entered. It need not be said that the problem would no longer have a practical side if a way were found to "regularize" the armed ships by granting them the juridical status of what in reality they seem to be, viz, auxiliary men-of-war. The study of this solution should also include the question whether a Government arming ships without assuming responsibility for their acts is satisfactorily performing the duties which members of the community of nations owe to their fellows.

10. In any case the number of burning issues in the law of maritime warfare has been considerably increased by the policy of the British Admiralty. It has, therefore, seemed expedient to us that the problem should also be put on the calendar of the International Law Association, whose constitution will allow it to approach the problem not from the standpoint of the interests of any one people at a given time, but from the point of view of the collectivity of nations.

A reconsideration of the problem by the International Law Association seems to us all the more necessary in that the discussions which in 1913 led the Institute of International Law to adopt paragraph 4 of article 12 of the maritime manual seems to us, be it said with all due respect, quite unsatisfactory. The rule in question reads as follows: "Both (private and public vessels not men-of-war), however, are allowed the use of force for self-defense against attack by a hostile ship." If with the majority of the institute one will infer from the text that a merchantman has a right to defend herself from arrest by a hostile man-of-war, one must also admit that such arrest constitutes an *attack*. To us it appears that Messrs. Hagerup, Fusinato, von Bar, and Triepel, who maintained at the sitting of the institute held August 5, 1914, that an *arrest* of a hostile merchantman by an enemy cruiser never constitutes an *attack*, have a very just cause, and that their argument merits more attention on the part of the International Law Association than the institute has accorded it.

But, however that may be, the paramount point is that a serious study of the problem of armed merchantmen is not exhausted by the study of the question as to the right of a merchantman to defend herself from arrest by a man-of-war on the adverse side. The all-important question is whether general interests allow of a policy tending to revolutionize maritime warfare in a most retrogressive fashion, and it is to be hoped that the International Law Association will approach the problem from this angle.

LEIDEN, *July, 1914.*

THE GOVERNMENT AND THE WAR—A REPLY TO MR. ROOSEVELT.

By GEORGE HARVEY.

[North American Review, May, 1915.]

Conspicuous among the attributes of our present Chief Magistrate, as we have remarked upon occasion, is a rare foresight distinguished by considerations of prudence with respect to his own personal prerogatives in coming years. It is without surprise, therefore, that we hear "from the White House" that Mr. Wilson does not accord with those of his partisans who resent as unbecoming criticism of the administration by his living predecessors. Even if all shall go well, not so very many years will elapse before he, too, will sit upon the judgment seat, and if by chance all should go ill that unhappy day is distressingly close at hand, for, be it noted, from the moment a President is renominated he becomes a slave of political expediency, at least for a time. Then if the verdict be favorable he reaps the reward of the good and faithful servant, but if it be unfavorable he resumes his position, in the consoling words of Benjamin Franklin, "among the masters."

It matters little, therefore, whether the President's interpretation of the single-term declaration made at Baltimore conforms with that of its author; the contingency still remains. Clearly, Mr. Wilson could not have applied the restriction of "etiquette" to the utterances of Mr. Roosevelt and Mr. Taft without causing misgiving with respect to himself as the leading forward-looking man of the country.

And he did well. We shall never have too many ex-Presidents ready and willing to speak from their abundance of knowledge acquired through experience. In point of fact, it happens less seldom than might be supposed that the country awaits with ill-concealed impatience the passing of a "ruler" into the ranks of the critical unemployed, upon the theory, of course, that his talents are better adapted to service in the latter capacity. A quite recent instance is in mind. Deeply, too, as all of us who are not engaged in business of one kind or another might regret the voluntary or involuntary withdrawal of our present Chief Magistrate from official occupation, none can deny the advantages which would accrue to an inexperienced President from the militant Americanism, the inspiriting philosophy, and the sophisticated righteousness of his immediate predecessors. The tendency, then, of our ex-Presidents to speak their minds freely is one to be encouraged, and we welcome the recent outgivings of Mr. Roosevelt, regardless of their characteristic fanfaronade.

Not that we agree with him—except as to certain phases of our Government's attitude toward bleeding Mexico, which is not now under consideration—far from it! But we yield to none in respect for and admiration of Mr. Roosevelt's distinctively American spirit and we readily acquit him of any suspicion of partisanship in dealing with matters involving patriotism. That he is, in fact, as he declares, "straight United States" nobody would think of questioning; but so are we, and so, as can be easily demonstrated in this instance, Mr. Roosevelt to the contrary notwithstanding, is President Wilson.

Mr. Roosevelt says in the Metropolitan:

> The United States, thanks to Messrs. Wilson and Bryan, has signally failed in its duty toward Belgium. We had pledged our support to the international agreements of The Hague, which explicitly guaranteed Belgium against the very type of disaster which first befell it, and against the hideous wrongdoing which followed upon this initial disaster; but with a timid shirking of duty, which has brought dishonor upon this Nation, the administration failed to utter one word in behalf of these violated agreements to which the Nation had been a party.
>
> Thanks to the administration, the United States has been faithless to its duty and has lost the chance to gain a moral ascendency that would have been a powerful influence for the best interests of humanity. When this the most powerful of the neutral nations which had signed the conventions of The Hague failed to protest against their violation, it lost its great opportunity to take an effective stand for peace and against lawless international violence.
>
> To judge by their actions, President Wilson and Mr. Bryan have believed that their conduct in preserving a tame and spiritless neutrality would somehow put them in a lofty position.
>
> They have vociferated high-sounding platitudes about peace and morality in the abstract, while not venturing to say one word about the violations of The Hague conventions by Germany at the expense of Belgium.

This is a severe—almost a savage—indictment; but is it warranted? What are the facts? In common, we assume, with his friend, Mr. St. Loe Strachey, and other English publicists whose utterances we have quoted, Mr. Roosevelt bases his animadversions upon the ground that it was and perhaps still is the duty of our Government to protest against the action of the German military forces (1) in invading Belgium, (2) in dropping bombs from air craft, (3) in destroying historic monuments, (4) in bombarding seacoast towns, (5) in using dumdum bullets, and (6) in planting contact mines in the high seas. Now let us consider these performances, as bearing upon our own national obligations under international law and usage, in turn:

1. *Invading Belgium.*—In considering the invasion of Belgium it should be pointed out that there is a distinction between *neutralized* States and *neutral* States, or that the neutrality of the two classes is essentially different in purpose and founded upon different principles.

The neutrality of *neutralized* States is a matter of conventional agreement between powers who are more or less interested in preventing the State from being absorbed politically by any power, or from becoming a base of military operations, or from otherwise assisting neighboring rival States. The agreement *imposes* a condition of permanent neutrality. It is, in fact, a guaranty not only by the neutralized State that it will not engage in aggressive warfare but also by the other parties to the treaty that it shall not be attacked by any of them. These restraining conditions are purely contractual

and are imposed and perpetuated from without. They do not exist by virtue of the rules of international law or the customs of nations, but solely by the treaties creating them.

The neutrality of a *neutral* State, on the other hand, is a condition which a nation other than the belligerents may assume voluntarily and regardless of treaty provisions upon the outbreak of an international war. It is optional with such a nation to join in the war or to remain neutral. If it determines to choose an attitude of neutrality, then international law imposes certain rights and duties upon it as a neutral State. But this attitude may be changed at will and the neutral may enter the war on either side. It is this optional nature of the neutrality of a neutral State that distinguishes it from the permanent neutrality of a neutralized State.

It is solely with the rights and duties of a neutral State that The Hague conventions on neutrality deal. They do not deal with the neutralization of a State or with the guaranties of the interested powers to preserve its neutralized status. Only those powers which are by agreement mutual guarantors of the neutralization of the State have a legal right under the agreement to complain of its violation. To the agreement of that sort in reference to Belgium the United States is not and has not been a party. It was a matter of European politics, pure and simple, with which we had no concern—an arrangement between the signatory powers to safeguard a condition resulting from conflicting interests. It would manifestly be improper and presumptuous for this Government to complain of the violation of such a treaty of neutralization to which it was not a party in any sense.

So far, therefore, as the invasion of Belgium may be considered a breach by Germany of a guaranty to preserve the character of Belgium as a *neutralized* State, this Government has neither the legal right nor duty to protest.

In respect to the violation of the neutrality of Belgium as a *neutral* State during an international war, The Hague conventions contain certain stipulations in article 1 of convention 5 of 1907, entitled "Convention respecting the rights and duties of neutral powers and persons in case of war on land," and in article 1 of convention 13 of 1907, entitled "Convention concerning the rights and duties of neutral powers in naval warfare."

These articles read as follows:

> The territory of neutral powers is inviolable. (Convention 5, article 1.)
>
> Belligerents are bound to respect the sovereign rights of neutral powers and to abstain, in neutral territory or neutral waters, from any act which would, if knowingly permitted by any power, constitute a violation of neutrality. (Convention 13, article 1.)

Article 20 of convention 5 further provides:

> The provisions of the present convention do not apply except between contracting powers, and then only if all the belligerents are parties to the convention.

It is not necessary to examine into the question as to whether these treaties were in force by virtue of all the belligerents being parties as required by article 2 of convention 5 and article 28 of convention 13, for the reason that, quite contrary to Mr. Roosevelt's definite assertion, *no Hague conventions were violated by the German invasion of Belgium.*

It is admitted that if Germany, before invading the territory of Belgium, had declared war against that country, the latter would have been impressed with the character of a belligerent, to whom the provisions of article 1 of convention 5 and article 1 of convention 13 relative to the inviolability of neutral territory would not be applicable, and that, having exercised this sovereign right, Germany could not be charged with violating neutral territory in contravention of the terms of The Hague conventions, but the fact that this is what happened is commonly ignored. Nevertheless, the published diplomatic correspondence shows that Germany did declare war by ultimatum and that a state of war actually existed between Germany and Belgium before German forces penetrated into the territory of the latter country.

Following the provisions of article 1 of Hague convention 3 of 1907, that hostilities must not commence "without previous and explicit warning in the form either of a reasoned declaration of war or *of an ultimatum with conditional declaration of war*," the German Government presented to the Belgian Government a note proposing, among other things, that German troops be given free passage through Belgian territory, and threatening in case of refusal to treat Belgium as an enemy. Belgium declined to accede to the proposal, with full knowledge that the consequence would be war with Germany. Upon her refusal Belgium lost her neutral character, and by operation of the ultimatum became a belligerent. After this status in the relations of the two countries was reached a state of war existed and German forces began the invasion of Belgium. This may have been a violation of an agreement neutralizing Belgium, but that is a question for the parties to that agreement, not for the United States, to determine.

That it was a declaration of war against a State previously neutral is evident, but a belligerent is not restrained by The Hague conventions from declaring war against a neutral State for any cause which seems to it sufficient. The conventions do not restrict such action to any stated casus belli. A belligerent under the present international system is at liberty to seek his own casus belli and to maintain it before the world. For another neutral to protest and denounce it as unjustifiable would be to exceed the bounds of international duty and custom.

A procedure for a third party in a case of this sort is, however, laid down in The Hague conventions. Convention 1 of 1907 provides in article 3 that it is expedient and desirable that "strangers" to the dispute should on their own initiative and as far as circumstances may allow "offer their good offices or mediation to the States at variance," and that "the exercise of this right can never be regarded * * * as an unfriendly act." Although Great Britain and Servia had not ratified this convention 1, yet in conformity with its provisions our Department of State on August 4 sent to Paris, Berlin, Vienna, and St. Petersburg, and on August 5 to London, the President's offer to act in the interest of European peace, either then or at any other suitable time.

It is difficult to see what further action the United States was called upon to take or could have properly taken in the situation presented at the outbreak of the war. The President might have

done less. To have done more would have been uncalled for and presumptuous in the extreme.

2. *Dropping bombs.*—The dropping of bombs from aircraft was prohibited by a declaration adopted by the Second Hague Conference in 1907, but as it was neither signed nor ratified by France, Germany, Russia, and Servia, and was signed but not ratified by Austria-Hungary, it is not in force in the present war, since the declaration provides that:

> The present declaration is only binding on the contracting powers in case of war between two or more of them.
>
> It shall cease to be binding from the time when, in a war between the contracting powers, one of the belligerents is joined by a noncontracting power.

The question may be raised, however, whether the dropping of bombs from aircraft falls under the provisions of articles 25 and 26 of Hague convention 4 of 1907, which reads as follows:

> The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited. (Article 25.)
>
> The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities. (Article 26.)

Without discussing whether or not this convention is in force, in view of the fact that Servia never having ratified it all belligerents are not parties to it, as required by article 2, the question as to whether a town, village, dwelling, or building is "not defended" within the meaning of article 25 is one of fact, which requires conclusive evidence to establish. Some have assumed that the words "not defended" are synonymous with "unfortified," but in the ordinary use of language "not defended" is a much broader term than "unfortified."

As to article 26, it must be determined whether the dropping of bombs from aircraft should be classed as a "bombardment" or as an "assault." If that method of attack can be properly termed a bombardment, it must be shown affirmatively that a commander of an attacking force did not do all in his power to warn the authorities prior to a bombardment before he can be charged with a violation of the provision. In the case of attacks by aircraft, evidence of the power to warn and of failure to do so has not been furnished.

But even if this evidence were furnished, it may not unreasonably be asserted that in the case of aerial offense the conditions are quite different from those attending a bombardment by land batteries; that in the former case the element of surprise is essential to success; that preliminary notice would give the enemy opportunity to send his aircraft aloft to intercept the attacking force; and that a warning under these conditions would be an unreasonable requirement. If these assertions are correct, then article 26 was never intended to apply to an aerial attack.

There appears, then, to be no substantial reason to affirm that the United States, as a party to The Hague conventions, should enter a protest against the practice of dropping aerial bombs upon places occupied by the enemy.

It may be added that, while this discussion relates to aerial operations by the German forces, the belligerents of both sides have employed this method of attack upon the enemy.

3. *Destroying historic monuments.*—The question of the violation of the rules of land warfare relative to the immunity from attack of certain classes of buildings is raised under the following provisions in article 27 of convention 2 of The Hague conventions of 1899:

In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity, hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

The besieged should indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

Similar provisions were incorporated in convention 4 of 1907, with the addition between the words "charity" and "hospitals" of the words "historic monuments."

Convention 2 of 1899 was ratified by all of the belligerents in the present war and by the United Staes, but convention 4 of 1907 was not ratified by Servia.

To establish a violation of the provisions quoted from convention 2 of 1899, or the similar ones of convention 4 of 1907, whichever may be considered to be in force, it is requisite to show (1) that certain of the class of buildings mentioned have been injured by bombardment, (2) that "all necessary steps" were not taken to spare them "as far as possible," (3) that they were "not being used at the same time for military purposes," and (4) that they were indicated "by distinctive and visible signs" which were notified to the assailants beforehand.

These four propositions, each of which is essential to substantiate a claim of violation of the treaty, have not been established, nor does it appear that they have even been asserted by those who charge violation of the treaty stipulations. Furthermore, the meaning of "all necessary steps" and "as far as possible" is open to a latitude of interpretation by the commander of an attacking force which involves his conception of the operations necessary to military success. Deplorable as may be the destruction of a cathedral or hospital by a bombardment, the fact alone is not sufficient to constitute a breach of The Hague convention. The other elements establishing a wanton and needless act must be conclusively shown.

It should also be added in this connection that the treaty itself determines the remedy to be applied in case of an unjustifiable destruction of buildings of the immune class, for article 3 of convention 4 of 1907 provides:

A belligerent party which violates the provisions of the said regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committee by persons forming part of its armed forces.

Obviously, this article contemplates an investigation of a more or less judicial nature as to the facts determining liability and the amount of damages sustained. A protest by a third party would be to impute guilt and to charge liability without a full investigation of the facts.

4. *Bombarding seacoast towns.*—The bombardment of seacoast towns by the naval forces of a belligerent is dealt with in the following articles of convention 9 of 1907:

Article 1. The bombardment by naval forces of undefended ports, towns, villages, dwellings, or buildings is forbidden.

A place can not be bombarded solely because automatic submarine contact mines are anchored off the harbor.

Article 2. Military works, military or naval establishments, depots of arms or war matériel, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbor are not, however, included in this prohibition. The commander of a naval force may destroy them with artillery after a summons followed by a reasonable time in waiting, if all other means are impossible, and when the local authorities have not themselves destroyed them within the time fixed.

He incurs no responsibility for any unavoidable damage which may be caused by a bombardment under such circumstances.

If for military reasons immediate action is necessary, and no delay can be allowed the enemy, it is understood that the prohibition to bombard the undefended town holds good, as in the case given in paragraph 1, and that the commander shall take all due measures in order that the town may suffer as little as possible.

Article 6. If the military situation permits, the commander of the attacking naval force before commencing the bombardment must do his utmost to warn the authorities.

This convention was ratified by the United States and by the belligerents except Servia, Turkey, and Montenegro.

Without raising the question of the nullifying effect upon the convention of its nonratification by these three belligerents, it may be pointed out that the word "undefended" is not an exact term, but may be variously interpreted. If a camp or barracks for troops is maintained, or if there is a depot for military or naval supplies, it is debatable whether or not the town can be classed as "undefended" in the sense in which the word is used in the treaty.

At all events, it must be shown that the port or town was undefended when bombarded or that the commander of the attacking force failed to perform his full duty in accordance with the provisions of the convention. Thus far evidence establishing either of these facts, which appear necessary to make out a violation of the treaty, has not been produced.

5. *Using dumdum bullets.*—The use of expanding bullets was first treated at The Hague Conference in 1899, and a provision relative thereto was inserted in a declaration of the conference in the following language:

The contracting parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions.

This declaration was ratified or adhered to by all of the present belligerents, but it was never signed or ratified by the United States. The United States, therefore, not being a party to the declaration, would have no duty or right to interfere in case of violation of its provisions by any of the ratifying or adhering powers.

It may be thought that Hague convention 4 of 1907, relative to the Laws and customs of war on land, article 23*e*, is broad enough to prohibit the use of expanding bullets. This article reads as follows:

In addition to the prohibitions provided by special conventions, it is especially forbidden * * *

(*e*) To employ arms, projectiles, or material calculated to cause unnecessary suffering.

This article is identical with article 23*e* of convention 2 of 1899, which was concluded at the same time as the declaration of 1899 just quoted. It appears to be conclusive, therefore, that the two provisions relate to different matters, for otherwise it would have

been unnecessary to execute two separate agreements. That the agreements were regarded by the conference as distinct is shown by the use in article 23*e* of the words "In addition to the prohibitions provided by special conventions." Corroborative of this is the fact that Great Britain did not adhere to the declaration of 1899 until August 30, 1907, while The Hague Conference was in session and was considering convention 4, of which article 23*e* is a part. The conclusion is inevitable that the prohibition of the use of expanding bullets depends upon the provisions of the declaration of 1899, to which, as already pointed out, the United States is not a party.

6. *Laying submarine contact mines.*—Reference to the laying of submarine contact mines on the high seas seems unnecessary, in view of the fact that the belligerents on both sides have apparently employed this method of naval warfare. It should, however, be pointed out that Russia neither signed nor ratified convention 8 of 1907 (it was signed but not ratified by Turkey or Montenegro), which restricts the use of such mines, so that the provisions of the convention do not apply in the present war.

It is important to note, in connection with this general subject of the violation of the rules of war on land and sea, which are laid down in The Hague conventions, that the belligerents on both sides of the great European conflict have repeatedly called to the attention of the world the disregard of their opponents for the rules of humane warfare recognized by international usage and treaty stipulations.

The frequency of these charges and the denials of the Governments charged indicate the influence which the public opinion of the world exerts upon the conduct of the belligerents, and shows their earnest desire to avoid the condemnation of civilization on the charge of inhumanity and wanton brutality.

While the conflict of evidence and the impossibility of impartial investigation at the present time prevent neutral nations from determining the truth or falsity of the charges and countercharges, the denials and defenses, which have been made by the belligerents, and therefore furnish no basis for protest, the time will undoubtedly come when the truth as to these charges can be conclusively shown and the responsibility can be measured by the standard of international law and justice. The guilty will then inevitably incur the odium of the civilized world, and those falsely charged will be vindicated. It is this future judgment of enlightened nations, as clearly set forth by President Wilson, which to-day must restrain the warring powers from inhuman practices, rather than condemnation by neutral powers for charges made in the heat of conflict and based upon incomplete knowledge of all the circumstances.

In view of the simple facts set forth above, the abstract question as to whether it is the right and duty of the United States, in any case, to protest against a violation of a Hague convention need hardly be considered. Since, however, Mr. Roosevelt bases his condemnation of the Government entirely upon his assumption that this obligation does exist, it is well to note that no such right or duty is set forth affirmatively in any document signed at The Hague. President Roosevelt's own delegates, moreover, took particular care

to absolve the United States from the obligation which he now takes for granted when they appended to the agreement the following explicit reservation:

> Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not intruding upon, interfering with, or entangling itself in the political questions of policy or internal administration of any foreign State.

The purpose of this proviso was, of course, to safeguard the Monroe doctrine, which guarantees our noninterference in European politics in return for the noninterference of foreign nations on this hemisphere. Surely Mr. Roosevelt must have been aware of this when he "ordered the signature of the United States to these conventions," and no less surely now, if he will stop and think, he must realize that the assumption by this Government of an obligation as guarantor of the neutrality or independence of any foreign State would imvolve complete abandonment of the Monroe doctrine—a consummation which he, of all men, would be the last to desire or to concede.

There remains the broader and less tangible ground of "duty to humanity" so naturally and readily seized upon as a basis of criticism by one who invariably places "social justice" high above the written law.

"There is something essentially ignoble," Mr. Roosevelt writes, "in having failed to stand up in generous and manly fashion for the rights of others who were grievously wronged, in having failed to do our duty, which we were pledged to perform, on behalf of humanity." And he adds:

> The failure of Messrs. Wilson and Bryan to do their duty to humanity and to carry out the obligations of this Nation in the case of Belgium has put us at a dreadful disadvantage as regards every protest made on behalf of our own interests.

This is our colonel at his best; none other would have the audacity to marry altruism and self-interest at the altar of misstatement. We have already shown beyond the possibility of question that by President Roosevelt's own direction the United States not only did not assume but explicitly disavowed any obligation whatever "in the case of Belgium." We now might fittingly inquire whether the safeguarding of "our own interests" under the pretense of serving "humanity" might not be justly pronounced something far more "essentially ignoble" than anything "Messrs. Wilson and Bryan" have done. It might also be well to remind Mr. Roosevelt that even he once swore solemnly, even though somewhat tentatively, if we may judge from his subsequent acts, to "preserve, protect, and defend"—what? "The rights of others grievously wronged"? Or the paradox of "humane" warfare? No. "The Constitution of the United States," and inferentially in hardly less degree the great tradition defined by George Washington in a letter to Patrick Henry in these words:

> My ardent desire and my aim has been to comply strictly with all our engagements, foreign and domestic, and to keep the United States free from political connection with every other country, to see them independent of all and under the influence of none. In a word, I want an American character that the powers of Europe may be convinced that we act for ourselves and not for others. This, in my judgment, is the only way to be respected abroad

and happy at home, and not, by becoming partisans of Great Britain or France, create dissension, disturb the public tranquillity, and destroy, perhaps forever, the cement which binds the Union.

It is not too much to say in truth, and not less than should be said in fairness and grateful appreciation, that the guidance of our ship of state by Woodrow Wilson and Robert Lansing through the whirling pools of this European conflict has never, in essential sagacity, resolution, and patience, been surpassed in the history of the Republic.

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